145-487

RECORD, CASE No. 13,481.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 322.

ALLEN BAKER, PLAINTIFF IN ERROR,

vs.

THOMAS KILGORE, NEXT FRIEND OF ELIZA J. SCRUGGS AND HER HUSBAND, FRED. SCRUGGS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED JANUARY 29, 1889.

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1 STATE OF TENNESSEE:

Transcript of the record and proceedings in a cause lately pending and determined in the circuit court, held at Greeneville, for the county of Greene and State aforesaid, in which Thomas Killgore, next friend of Eliza J. Scruggs and Fred. Scruggs, were plaintiffs and Allen Baker, defendant.

Caption of Court.

Be it remembered that at a circuit court of the first judicial circuit, begun and held in and for the county of Greene, at the
2 court-house, in the town of Greeneville, on the second Monday in February, being the 14th day, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States of America one hundred & eleventh—present and presiding, the Hon. Andrew J. Brown, judge, commissioned and duly qualified to hold the courts of the first judicial circuit in the State aforesaid.

Affidavit.

STATE OF TENNESSEE, }
Greene County. }

Personally appeared before me, J. C. Davis, an acting jus-
3 tice of the peace, Thomas Killgore, as next friend of E. J. Scruggs, who, being sworn according to law, makes oath that, according to his information and belief, the plaintiff, E. J. Scruggs, is entitled to the possession of the property proposed to be replevied; that the defendant has bought and detains the same; that said property was not subject to such seizure, detention, or execution, it being her separate property, and demanding a writ of replevin.

Given under my hand this Octo. 12, 1886.

THOMAS A. KILLGORE,
As Next Friend of E. J. Scruggs.

4 *Bond.*

Know all men by these presents that we, Fred. Scruggs, agent of E. J. Scruggs; R. A. Davis, & W. C. Scruggs, Sen., are held and firmly bound unto Allen Baker in the sum of eighty dollars; for which payment, well and truly to be made, we bind ourselves, our heirs, unto the said Allen Baker, his heirs, jointly and severally, firmly by these presents. The condition of this obligation is such that whereas the property of the said E. J. Scruggs has been levied upon and sold and bought by Allen Baker: Now, if the said Fred. Scruggs, agent of E. J. Scruggs, shall prosecute said suit with
5 effect, or, in case of failure therein, shall well and truly pay and satisfy unto the said Allen Baker all such costs, damages, &c., as shall be awarded, and pay all costs (or suit gained), the

above obligation to be void; otherwise to remain in full force and effect.

E. J. SCRUGGS,
Per F. SCRUGGS.
WM. C. SCRUGGS.
R. A. DAVIS.

Magistrate's Warrant.

STATE OF TENNESSEE, }
Greene County. }

To any lawful officer of said county to execute and return:

6 I command you to summon Allen Baker to appear before me or some other justice of the peace of said county to answer the complaint of E. J. Scruggs, who sues by Thomas Killgore, as next friend, for unlawfully taking out of her (E. J. Scruggs') possession and detaining from her 4 head of cattle—3 heifers, 1 steer—the property of the said E. J. Scruggs, and I also command you to take said property out of the possession of the said Allen Baker and deliver the same to the said E. J. Scruggs, and having given bond and security as required by law.

This Octo. 12, 1886.

J. C. DAVIS, *J. P.*

Magistrate's Judgment.

7 In this case I gave judgment against the plaintiff for the cost of the 2d continuance and gave judgment in favor of the plaintiff as named in the warrant and taxed the defendant with the costs of trial.

This Dec. 4, 1886.

JAMES C. DAVIS, *J. P.*

Continuance.

Continued until Nov. 13th, 1886, as upon affidavit by the plaintiff.
JAMES E. DAVIS.

Continued until Saturday, 4th of December, 1886, as upon affidavit by the defendant.

JAMES E. DAVIS, *J. P.*

8 Endorsement on warrant:
Replevin warrant. Thomas Killgore, as the next friend of E. J. Scruggs, *vs.* Allen Baker. Issued Octo. 12, 1886. J. C. Davis, J. P.

Executed as commanded and returned for trial before J. C. Davis, at Etler and Hale's Store, on the 23rd of October, 1886.

T. H. SULOMON, *Const.*

Prayer for Appeal.

THOMAS KILLGORE, as Next Fr'd of E. J. Scruggs,
vs.
ALLEN BAKER.

From the judgment by me rendered in this case on the 4th day of Dec., 1886, the defendant prayes an appeal to the next
9 term of the circuit court of Greene county, which is granted, the said defendant having given bond and security this Dec. 6th, 1886.

JAMES C. DAVIS, *J. P.*

Appeal Bond.

We, Allen Baker and James S. Neilson, bind ourselves — our heirs to Eliza J. Scruggs and Thomas Killgore, her next fr'd, in the sum of one hundred dollars, to be void if the said Allen Baker, who has this day appealed to the next term of the circuit court for Greene county from a judgment of James C. Davis, a justice of the peace of said county of Greene, in favor of Eliza J. Scruggs & Thomas Killgore, her next fr'd, against the said Allen Baker, for the
10 costs of suit in a case of replevin, shall prosecute said appeal successfully, or, in case of failure, shall comply with and perform the judgment of said court.

This 6th day of December, 1886.

ALLEN BAKER. [SEAL.]
JAS. S. NEILSON. [SEAL.]

Caption & Continuance.

FRIDAY, *February 25th*, 1887.

Court met pursuant to adjournment.

Present and presiding the same judge as on yesterday.

Yesterday's proceedings read and signed, and the following additional proceedings were had and ordered to be entered of record, to wit:

11 THOMAS KILLGORE, as Next Fr'd of E. J. Scruggs,
vs.
ALLEN BAKER. } Continuance.

Come the parties, by their attorneys, & by consent this cause is continued till the next term of this court.

Caption of Court.

Be it remembered that at a circuit court of the first judicial circuit begun and held in and for the county of Greene, at the courthouse, in the town of Greeneville, on the second Monday in February, being the 13th day of the month, in the year of our Lord one thou-

sand eight hundred & eighty-eight (1888), and of the Inde-
12 pendence of the United States the one hundred & twelfth.

Present and presiding, the Hon. A. J. Brown, judge, elected, commissioned, and duly qualified to hold the courts of the first judicial circuit, in the State aforesaid.

Motion to Dismiss.

WEDNESDAY, *Feb.* 22, 1888.

Court met pursuant to adjournment, the Hon. A. J. Brown, judge, &c., presiding.

Yesterday's proceedings read and signed, and the following additional proceedings were had and ordered to be entered of record, to wit:

THOMAS KILLGORE, Next Fr'd of E. J. Scruggs,
vs.
ALLEN BAKER.

13 In this cause the defendant moves the court to dismiss the cause on the ground that in a court of law a married woman as a party must be joined with her husband, and the further ground that there is no antagonism between the husband & wife as that the wife might sue alone, nor is there any other circumstance shown that by the laws of Tennessee would allow the wife to proceed without the joinder of the husband. Thereupon, on application of the plaintiff, it is allowed to so amend the cause as to parties as to join Frederick Scruggs, the husband of said Eliza J., with her as plaintiff, and said Frederick Scruggs in open court assented thereto.

14 *Judgment of Court.*

WEDNESDAY, *Feb.* 24, 1888.

Court met pursuant to adjournment—the Hon. A. J. Brown, judge, &c., presiding.

Yesterday's proceedings read and signed, and the following additional proceedings were had and ordered to be entered of record, to wit:

E. J. SCRUGGS & Her Husband, FREDERICK SCRUGGS,
vs.
ALLEN BAKER. } Judg't.

Come the parties, by their attorneys as well as in their proper person, and this cause was tried by the court, who found the matters in controversy in favor of plaintiff-.

15 It is therefore considered by the court that the pl'ff, for the use of the wife, Eliza J. Scruggs, have and recover of the defendant, Allen Baker, the four head of cattle replevied and delivered to her under the writ, to wit, three heifers and one steer, and all the costs of this cause before the justice, and of said Allen Baker and Jas. L. Neilson, security on the appeal bond, all the costs of this

court, including State and county tax, for which an execution will issue.

Exception to Ruling of Court.

SATURDAY, *Feb.* 25, 1888.

Court met pursuant to adjournment, the Hon. A. J. Brown, judge, &c., presiding.

16 Yesterday's proceedings read and signed and the following additional proceedings were had and ordered to be signed, to wit:

THOMAS KILLGORE, Next Fr'd of Eliza J. Scruggs & Fred. Scruggs,
vs.
ALLEN BAKER. } Appeal.

In this cause the defendant moved the court to grant a new trial; which motion and argument was overruled; to which action of the court, as well as its findings and judgment on its hearing, defendant excepts, and tenders a statement of the facts shown by the proof in the cause, which, it is agreed by the parties, is correct as a bill
17 of exceptions, and prays that the same be signed, sealed, and made a part of the record in this cause, which is accordingly done; from all of which action of the court defendant prays an appeal to the next term of the supreme court of Tennessee, at Knoxville, & bond, with security as required by law, being given, such appeal is allowed.

The court held in the decision of this cause that chattels which by investments of the crops *are* [or] immediate proceeds of the lands which were owned by said Eliza J. Scruggs were *effectual* [affected] with the same incidents of right and title as the proper crop itself.

Agreed State of Facts.

18 THOMAS KILLGORE, Next Fr'd of Eliza J. Scruggs & Frederick Scruggs, Her Husband,
vs.
ALLEN BAKER.

In this cause it is agreed that the evidence offered showed that Eliza J. and Frederick Scruggs were married about 18 years ago; that they have lived together ever since, and mostly on lands deeded to her as follows:

By deed dated January 1, 1881, executed by George D. McClister, for 131 acres; one deed for 274 acres, from W. C. Scruggs (father of Frederick), 19 of April, 1877, and one, the farm, Sarah J. McCenly, 8th of May, 1886, for 108 acres, all in fee simple to Eliza J. Scruggs, but not creating a technical separate estate; that some years ago
19 said Frederick failed and since then has been attending to her business and trading for her in stock, hogs, &c., superintending farm work, &c., as her agent; also occasionally trading in

live stock for himself; also from 1879 to 1881 said Frederick had been merchandising in a house in the yard of their home dwelling lot in the name of his father, and from 1881 to 1884 in his brother William's name, and with their monies, said Frederick to receive and keep all profits; that said Frederick and his said wife took from said store whatever they each wanted and paid hands working on the farm partly out of the store and put back into the store
20 proceeds from the farm, but without strict accounts kept against either of them, as against strangers, as between the said husband and wife, or between them & the said William for years, and that the said Frederick did not keep his wife's funds strictly separate from his own, often com-ingling them; that in the spring of 1884 the said Frederick sold some cattle of his wife's for about $200.00; some time after he bought two head of young cattle for her out of or with part of this money, and in Sept. or Octo. following he purchased one other steer for her with the proceeds of what was raised on her farms, and while depasturing together another calf dropped on her land by one of
21 her cows. They were levied on as the property of the said Frederick on an execution issued on the 10 day of Sept., 1886, on a judgment rendered in favor of J. L. D. Scott against the said Frederick on the 22d day of Sept., 1876, and the same was sold at public outcry at regular sale by the proper officer 10 days after levy and purchased by the defendant Allen Baker, he having read a notice from the said Eliza that she would replevy said cattle as her property should any one purchase the same, and that she took out replevin on 12th of October following & thereby obtained possession of the said four head of cattle,
22 and this suit came into the hon. circuit court by appeal, and these were the only material facts appearing in proof. On the foregoing facts the court found:

1st. That the four head of cattle were the property of Mrs. Scruggs, being a part of the proceeds of the rents and profits of her estate, bought with the same, and held:

Second. That the act of the Tennessee legislature of 1879, ch. 141, M. & V. Code, § 3343, as applied to this case, is valid and not unconstitutional and — violation of the Constitution of the United States nor the constitution of Tennessee as *imposing* the obligation of contracts by withdrawing from liability under said judg-
23 ment of 1876 property subject thereto when same was rendered and when the original contract it was rendered on was made, nor retroactive, divesting vested rights of the husband or his creditors.

3rd. That said act was operative to protect the cattle purchased, as shown by the proof, with money arising from the sale of her other cattle in the spring of 1884, and also the other two head, the one dropped on her farm *and* of her cow, the other purchased by her husband for her with money arising from the sale of her wheat raised on her lands, holding that these cattle then taken by execution & sold were the rents and profits of her said lands & pro-
24 ceeds thereof.

To all of these rulings and judgments made & rendered by the court defendant excepts.

And it is further agreed, to save costs, as all the material facts in proof appear in the foregoing agreed statement of facts, that the depositions and deeds on file need not be copied into the transcript nor any other paper immaterial to raise the issue of law; the warrant and return, execution and return, orders & findings, judgments of this court, this agreed state of facts shall be coppied.

25 *Appeal Bond.*

Know all men by these presents that we, Allen Baker, principal, and Robert McKee, surety, are jointly and severally held and firmly bound unto Mrs. Eliza J. Scruggs & her husband, Fred. Scruggs, in the penal sum of two hundred & fifty dollars, but to be void on condition that the said Allen Baker doth with effect prosecute an appeal granted this day from a judgment of the circuit court of Greene county, State of Tennessee, to the supreme court of Tennessee, at Knoxville, in case of Thomas Killgore, next fr'd of Mrs. Eliza J. Scruggs & her husband, Fred. Scruggs, against said Baker; otherwise to pay and satisfy all costs and damages that may be awarded for failure.

26 Witness our hands and seals this 25th day of Feb., 1888.

ALLEN BAKER, [SEAL.]
By att'ys, ROBINSON & McKEE.
ROBT M. McKEE, *Surety.*

Attest: J. B. WALKER.

27 *Bill of Costs.*

THOMAS KILLGORE, Next Fr'd of E. J. Scruggs & Fred. Scruggs,
vs.
ALLEN BAKER.

State tax	$2 00
Clerk Walker:	
Receiving & fil. papers, .75; filing 7 depositions, $1.75; 30 sub's, $3.00; 6 dockets, .60; 3 contin., .75; motion to dismiss, .25; motion to amend, .25; judg't, .75; motion for new trial, .25; appeal, .25; filing appeal bond, .25; fil. bill of exceptions, .25; transcript, 3,000 words, $3.00; bill of costs, .50; seal, postage, & copies of bill of costs, .75	13 35
Sheriff A. J. Stephens:	
Summoning 1 witness	25
D. Sheriff D. N. Hall:	
Sum. 3 wit's	75
	$16 35

28 Wit. at court, p'*ft*'s':

							$16 35
Wit. C. D. McKamy,	2	days,	54	m.	(O. C.)		5 70
" Thos. Killgore,	2	"	64	"	"		6 20
" J. H. McClister,	2	"	78	"	"		6 90
" Foster Whiteside,	2	"	64	"	"		6 20
" N. G. Taylor,	2	"	64	"	"		6 20
" B. F. Stubblefield,	2	"	64	"	"		6 20
" W. H. Mays,	2	"	64	"	"		6 20
" J. T. Hays,	2	"	64	"	"		6 20
" J. L. Clemmer,	2	"	26	"	"		4 04
Def't's witnesses:							
" W. T. Rippeton,	2	"	64	"	"		6 20
" Milton Steele,	2	"	40	"	"		3 60
" T. A. Jones,	2	"	50	"	"		5 50
" W. M. Timmons,	2	"	50	"	"		5 50
" J. A. Maloney,	2	"	36	"	"		3 44
Cost on depositions:							
J. McClister, taking 3 dep's							3 00
Andrew Sawyer, wit., 1 day							1 00
R. A. Davis, " 1 "							1 00
Elizabeth Ander, " 1 "							50
Jackson Neilson, " 1 "							50
							$100 43

29 Justice J. C. Davis, judg't, .50; 1 continuance, 10c.; docket, .15 75

Fred. Scruggs, witness, 1 day 1 00

$101 68

STATE OF TENNESSEE, *Greene County.*

I, J. B. Walker, clerk of the circuit court of said county, do certify that the foregoing is a perfect transcript of the record and bill of costs remaining in my office in the case of Thomas Killgore, as next friend of E. J. Scruggs and Fred. Scruggs, *vs.* Allen Baker.

Given under my hand & seal of office, at office, in Greeneville, this March 27th, 1888.

J. B. WALKER, *Clerk.*

30 *Assignment of Errors. Filed Sept.* 3, 1888. *E. C. Reevls, Cl'k.*

In the Supreme Court of Tennessee, at Knoxville.

ALLEN BAKER, in Error,
vs.
THOMAS KILGORE, Next Fr'd of Eliza J. Scruggs and Fred. Scruggs, Her Husband. } Law Cause.

The plaintiff in error, appellant, sets down the following errors in the finding and judgment of the circuit court, viz:

I.

It is not shown by the proof that the cattle in controversy were of the proceeds of lands acquired by said Eliza, the wife, after the act of 1879 was passed.

(Transcript, pp. 17, 18, 19.)

II.

31 The act of 1879, if it contemplated a case like this, would be unconstitutional, because the husband had a vested right to the proceeds of the lands held then by the wife that no law could divest.

III.

But the act of 1879 is not unconstitutional when applied to cases of land acquired by the wife after its passage or of marriage after its passage, and by its terms the act is wholly silent as to then existing marriage and already acquired lands. The act will not be construed in such way as to give it an unconstitutional intent.

IV.

There is no decision of this court of any case in which the
32 facts appear that applies to the act of 1879 to lands acquired by the wife previous to its passage and where the marriage was subsisting at the time of its passage. The case at bar is just such a case, and the facts of the case of Taylor *v.* Taylor, 12 Lea, 490, do not appear to be similar.

ROBINSON & ROBINSON,
McKEE, *Atto's.*

Answer to Assignments of Errors.

The act of 1879, M. & V. Code, § 3343, as construed and applied by this court in Taylor *vs.* Taylor, 12 Lea, 490, is a conclusive answer to all assignments of error.

INGERSOLL,
For Appellee.

33 TUESDAY, *Nov.* 13, 1888.

Court met pursuant to adjournment.

Present and presiding: Chief Justice Peter Turney and Associate Justices W. C. Caldwell, W. C. Folkes, H. H. Lurton, & D. L. Snodgrass.

The minutes of yesterday were read and signed and the following business transacted:

ALLEN BAKER, in Error,
vs.
THOS. KILGORE, Next Fr'd of Eliza J. Scruggs & Husband, Fred. Scruggs. } Judg't.

This cause was heard this 13th day of November, 1888, by the supreme court of the State of Tennessee, at Knoxville, upon
34 the transcript of record from the circuit court of Greene county and argument of counsel, and the court being of opinion that the act of the General Assembly of said State of the year 1879, chap. 141 (M. & V. Code of 1884, sec. 3343), applies to contracts of the husband made before the passing of said act and where the marriage relation was then subsisting and as to the income from lands acquired by the wife before such passing, the right to the income from which had attached theretofore in favor of the husband, and that said act is not obnoxious to section 10 of art. 1 of the Constitution of the United States and does not impair the obligation of contracts—

35 The court is therefore of opinion that there is no error in the judgment of said circuit court pronounced on the 24th day of February, 1888, and the same is accordingly affirmed. The costs of the cause will be paid by said Allen Baker, principal, and Rob't M. McKee, surety, on the bond for costs; for all of which execution is accordingly awarded.

STATE OF TENNESSEE:

I, E. C. Reeves, clerk of the supreme court of said State, do hereby certify that the foregoing is a full, true, & perfect copy of the transcript and judgment of the supreme court in the case of
36 Allen Baker, in error, *vs.* Thos. Kilgore, next fr'd of Eliza J. Scruggs & her husband, Fred. Scruggs, as the same appears on file and of record in my office.

Given under my hand and seal of said court, at office, this 17th day of Nov., 1888.

[Seal of the Supreme Court, Knoxville, Tenn.]

E. C. REEVES *Clk*,
By C. H. JENNINGS, *D. C.*

Received from Robert M. McKee $4.75, costs of this trans. in full, Jan. 4, '89.

E. C. REEVES, *Clk*,
By C. H. JENNINGS, *D. C.*

37 To the Honorable —— ——, associate justice of the Supreme Court of the United States:

The petition for writ of error of Allen Baker, a resident citizen of Greene county, State of Tennessee (and within the United States judicial district of east Tennessee), petitioner, respectfully represents as follows, to wit:

(1st.) On the 13th day of November, A. D. 1888, the supreme court of said State, at Knoxville, pronounced final judgement in the cause therein pending of petitioner, in error, against Thomas Kilgore, next friend of Eliza J. Scruggs and her husband, Fred. Scruggs.

(2nd.) Said judgement is adverse to petitioner.

38 (3rd.) Said State court is the highest judicial tribunal of said State and the last in said State to which resort can be had in such cases as that aforesaid.

(4th.) Said parties—Kilgore and Scruggs and wife—all reside in said county.

(5th.) The General Assembly of said State, by ch. 141, Acts of 1879, enacted that—

"Hereafter the rents and profits of any property or estate of a married woman, which she now owns or may hereafter become seized or possessed of * * * shall in no manner be subject to the debts or contracts of her husband, except by her consent obtained in writing." No such (or similar) provision had theretofore been made by the laws of said State. The same provision was carried into the consolidated acts of said assembly of the year A. D. 1884.

Milliken and Vertrees' Code, sec. 3343.

Said act does not relate to technical "separate estates," but includes lands that the husband's rights would attach upon

39 but for said statute.

(6th.) Said State court by said judgment declares that said act of 1879 (now in said Code section) is not repugnant to the Constitution of the United States, article I, sec. 10, relating to laws of States impairing the obligation of contracts, in a case the facts of which are as follows:

(*a*) The debt contracted by the husband before said act was passed.

(*b*) The marriage subsisting at the time said act was passed.

(*c*) The lands acquired by the wife before the passing of said act.

Transcript, pp. 18–21.

The above stated being the facts of said cause, and upon which facts said State court construed said act to apply in favor of said Eliza J., and adjudged accordingly against petitioner as aforesaid.

To have reversed the alleged error of said State court de-

40 claring said act (as construed by it) not to be repugnant to said provision of the Constitution, this petition is brought; and, on account of the premises, petitioner prays that a writ of error issue to said State court with the usual requirements in such cases;

that all proper process issue, and that said alleged error be corrected.

ALLEN BAKER.

Writ of error allowed this 21st of November, 1888.

JOHN M. HARLAN,
Associate Justice Supreme Court of the U. S.

[Endorsed:] Baker, in error, *v.* Kilgore, next friend of Scruggs *et al.* Petition for writ of error.

41 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Allen Baker, plaintiff in error, and Thomas Kilgore, next friend of Eliza J. Scruggs and her husband, Fred. Scruggs, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty
42 or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Allen Baker, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the twenty-sixth day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Justice Sup. Ct. U. S.
Nov. 26, '88.

[Endorsed:] Original writ of error.

43 The United States of America to Thomas Kilgore, next friend of Eliza J. Scruggs and her husband, Fred. Scruggs, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to writ of error filed in the clerk's office of the supreme court of the State of Tennessee, wherein Allen Baker is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 26th day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN M. HARLAN,
Justice Supreme Court of U. S.

44 [Endorsed:] Original citation. Return this one.

On this seventh day of January, in the year of our Lord one thousand eight hundred and eighty-nine, personally appeared Andrew B. Keicher (deputy sheriff) before me, the subscriber, W. H. Piper, clerk of the county court of Greene county, State of Tennessee, and makes oath that he delivered a true copy of the within citation to the within-named Thomas Kilgore and a like copy to the within-named Fred. Scruggs, both so delivered on the seventeenth day of December, 1888.

ANDREW B. KEICHER.

Sworn to and subscribed the seventh day of January, A. D. 1889.
W. H. PIPER,
Clerk of the County Court of Greene County, Tennessee.

Received from Allen Baker $2.00, my fee for service of this citation, this 7th Jan'y, 1889.

A. B. KEICHER, *D. Sh'ff.*

Rec'd from Allen Baker 50 cents, my fee for above certificate and seal, this 7th Jan'y, 1889.

[Official Seal County Court, Greene County, Tenn.]

W. H. PIPER, *Clerk.*

45 (Copy.)

Know all men by these presents that we, Allen Baker, principal, and Rob't M. McKee, Horace N. Baker, and —— ——, sureties, are held and firmly bound unto Thomas Kilgore, next friend of Eliza J. Scruggs and the husband of the latter, Fred. Scruggs, in the full and just sum of five hundred dollars, to be paid to the said Kilgore & Scruggs & wife or their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23rd day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a regular term, to wit, Sept. term, 1888, of the supreme court of the State of Tennessee, at Knoxville, in a suit depending in said court between said Baker, plaintiff in error, and said Kilgore, as next friend aforesaid of Eliza J. Scruggs and her husband, Fred. Scruggs, defendants in the same, a judgment was rendered against the said Baker, and the said Baker having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Kilgore, Mrs. Eliza J. and Fred., her husband, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Baker shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ALLEN BAKER. [SEAL.]
By att'y, ROB'T M. McKEE.
ROB'T M. McKEE, *Surety.* [SEAL.]
HORACE N. BAKER. [SEAL.]
ABNER J. FRAZIER. [SEAL.]

Sealed and delivered in presence of—
JOHN H. TRIM.
A. B. WILSON.

Approved this Nov. 26, '88, by—
JNO. M. HARLAN,
Justice Supreme Court U. S.

Nov. 26, 1888.

I certify that this bond is good & sufficient for the sum of $500 & for the purposes for which it was executed.

FELIX A. REEVE.

46 STATE OF TENNESSEE:

I, E. C. Reeves, clerk of supreme court of said State, do hereby certify that the foregoing is a full, true, & perfect copy of the original bond for writ of error to the Supreme Court of the United States

in the case of Baker, in error, *vs.* Kilgore, next friend, *et al.*, as the same appears on file in my office.

Given under my hand and seal of said court this 16 day of Jan'y, 1889.

[Seal of the Supreme Court, Knoxville, Tenn.]

E. C. REEVES, *Clk.*

47 *Assignment of Errors.*

In the Supreme Court of the United States, October Term, 1889.

ALLEN BAKER, in Error,
v.
THOMAS KILGORE, Next Friend of Eliza J. Scruggs and Fred. Scruggs. } No. —.

Said Allen Baker, plaintiff in error, comes by attorney and sets down the following alleged errors in the judgement of the supreme court of the State of Tennessee, at Knoxville, in this cause:

An act of the General Assembly of said State is in these words, to wit:

"Hereafter the rents and profits of any estate or property of a married woman, which she now owns or may hereafter become seized or possessed of, either by purchase, devise, gift, or inheritance,
as a separate estate, or for years or for life, or as a fee-simple
48 estate, shall in no manner be subject to the debts or contracts
of her husband, except by her consent obtained in writing: Provided, that the act in no manner interferes with the husband's tenancy by the curtesy."

All laws in conflict with this act were expressly repealed by it.

Said act was approved and went into operation the 26th day of March, 1879—

Acts Gen. Assem. of Tenn'ee, ch. 141, p. 182.

and was carried into the Code of 1884 of said State.

Milliken and Virtree's Code, section 3343.

I.

Said judgement of the State court applies said act in favor of the wife to rents and profits of land owned by the wife at the time said act took effect, the marriage subsisting also at that time.

II.

Said judgement applies said act in favor of the wife against the creditor of her husband whose debt was subsisting at the time said act took effect.

49 III.

Said judgement applies said act in favor of the wife notwithstanding all the conditions specified in the foregoing alleged errors con-

cur in this case, to wit, marriage, title in the wife, and subsisting indebtedness of the husband at the time said act took effect.

Record, pp. —.

IV.

Said act by said decision is made to apply in favor of the husband, the debtor, notwithstanding all the conditions specified in the foregoing alleged errors concur in this case.

On all of which grounds it is alleged by plaintiff in error that said judgement is erroneous in every particular, for the reason that said act, in its aforesaid application, would "impair the obligation of contracts," and is therefore repugnant to the provision of the Constitution of the United States, expressed in section 10 of article I thereof, which forbids a State of the Union to enact any
50 "law impairing the obligation of contracts."

V.

Said act in any application whatever is repugnant to the provision of said Constitution, expressed in article 5 of the amendments to the same, which forbids that "any person * * * shall be * * * deprived of * * * property without due process of law." Said act, in terms, declares and its effect would be an exemption of the husband, debtor, in such case, from the general laws of liability for debt, and therefore said act, as against the creditor of the husband, would authorize and permit that against which said Constitution guarantees; and—

VI.

Said act in any application whatever is repugnant to the provision of said Constitution, expressed in section 1 of article 14 of said amendments, which forbids that "any State deprive any person of * * * property without due process of law," by which
51 "due process of law" is meant "the law of the land," which must be impartial in its intent and operation and without favor or privation to one person more than another in its application, whilst said act declares, in terms, and its effect would necessarily be an exemption of the husband, debtor in such case, from the general law of liability for debts.

Wherefore plaintiff in error prays that said judgment be reversed and that proper citations to said defendants in error issue.

ROBINSON,
McKEE,
Atto's for Pl'tff in Error.

Endorsed on cover: Case No. 13,481. Tennessee supreme court. No. 322. Allen Baker, plaintiff in error, *vs.* Thomas Kilgore, next friend of Eliza J. Scruggs and her husband, Fred. Scruggs. Filed January 29, 1889.

JAMES H. McKENNEY
CLERK

Brief pp. 1-12:—Argument following.

UNITED STATES SUPREME COURT.

Record, Case No. 13,481.

ALLEN BAKER, PLAINTIFF IN ERROR,
v.
THOMAS KILGORE, NEXT FRIEND OF ELIZA J. SCRUGGS, AND HER HUSBAND, FRED. SCRUGGS.

McKee's Brief for Plaintiff in Error.

October Term, 1889.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE, AT KNOXVILLE.

UNITED STATES SUPREME COURT.

Record, Case No. 13,481.

Allen Baker, Plaintiff in Error,

vs.

Thomas Kilgore, next friend of Eliza J. Scruggs and her husband, Fred Scruggs.

McKee's Brief for Plaintiff in Error.

October Term, 1889.

Writ of error to the Supreme Court of the State of Tennessee, at Knoxville.

An action of replevin, commenced before a Justice of the Peace, by Kilgore, next friend of Mrs. Scruggs, to which the husband of the latter was afterwards, on application of the next friend, made a party.

The judgment of the Justice is in favor of the next friend; from which, plaintiff in error appealed to the Circuit Court, by which the Justice's judgment was affirmed; from this judgment of affirmance, the plaintiff in error appealed to the Supreme Court of the State, by which the judgment of the Circuit Court was affirmed. To reverse this last judgment, plaintiff in error obtained a writ of error from this Court.

The suit was brought to recover four cattle, claimed to belong to Mrs. Scruggs. Plaintiff in error claims the cattle by purchase at sale made by a constable, in pursuance of levy of execution that issued upon a judgment in favor of Scott against Scruggs, the husband.

An act was passed by the General Assembly of Tennessee, approved and took effect 26th March, 1879, as follows: "Hereafter the rents and profits of any property or estate of a married woman, which she now owns or may hereafter become seized or possessed of, either by purchase, devise, gift or inheritance, as a separate estate, or for years, or for life, or as a fee simple estate, shall in no manner be subject to the debts or contracts of her husband, except by her consent, obtained in writing: Provided, that the act shall in no manner interfere with the hunband's tenancy by the curtesy." All conflicting laws are expressly repealed by this act.

Acts of Tennessee, 1879, Ch. 141, p. 182–3.

This act is brought into the Code of 1884.

Milliken and Vertrees' Code, sec. 3343.

Under this act the next friend claims that the cattle are exempt from liability for Scott's demand.

The wife owned *three* tracts of land; all occupied and used alike,—one of 274 acres, acquired in 1877,—one of 131 acres, acquired in 1881,—the other of 108 acres, acquired in 1886; all in fee simple, but not *separate estate*. The husband and wife intermarried about 1870 or 1871. The judgment in favor of Scott was rendered in 1876.

Record, side p. p. 18. 21.

It is not shown that the cattle were the issue of any particular one, or part, of the three tracts, but only of the three as *a whole*.

If the issues of the lands acquired by the wife after the act took effect, are exempt in such case, it must be shown *affirmatively*, that they are such issues.

Bergey's Appeal, 100 Am. Dec. 582–3. [60 Penn. St. 408.]

McCoy v. *Brennan*, 1 Am. St. Rep. 591. [61 Mich. 362.]

The presumption is against her in such case.

Seitz v. *Mitchell*, 4 Otto. 580–586. [Bk. 24, Co-op. ed. 180.]

Rush v. *Vought*, 93 Am. Dec. 770. [55 Penn. St. 437.]

An intermixture, permitted by the wife, of her exempt property, with the husband's property, is fatal to her exemption right.

Shirley v. *Shirley*, 9 Paige Ch. 364, 365.

Glidden v. *Taylor*, 91 Am. Dec. 101–2. [16 Ohio St. 509.]

Smith v. *Bailey*, Supreme Court of Texas, Oct., 1886. [66 Texas.]

Then the case must stand as if *all* the lands had been acquired before the act of 1879.

The jurisdiction of this Court.

The finding of the judge of the State Circuit Court is that the act is not repugnant to the constitution of the United States, "as impairing the obligation of contracts."

Record, side p. p. 22–3.

The judgment against the husband was rendered before the act was passed.

Record, side p. p. 21. 22.

One tract of the land, (the larger part of the whole), was acquired by the wife before the act was passed.

Record, side p. p. 18. 22.

In Tennessee, the pleadings before Justice of the Peace are *ore tenus*.

Wood v. *Hancock*, 4 Hump. 465, 467.

Hence the record, as it was, when the cause was heard by the State Supreme Court, presented the qnestion—is the act repugnant to the Constitution of the United States?

But only the *judgment of the State Supreme Court*, need be looked to, to determine the jurisdiction of this Court. That judgment declares that, in case of contracts by the husband before the act was passed—the marriage subsisting at the time the act was passed—and as to issues from land acquired by the wife before its passage,—that in a case where all these facts concur, the act is not repugnant to section 10, of article 1, of the constitution of the United States; and that in such case, the act does not "impair the obligation of contracts."

Record, side p. 34.

Thus the decision of that Court is made to *rest expressly* on the declared constitutionality of the act, as construed by it.

Satterlee v. *Matthewson*, 2 Pet. 410. [Book 7, Lawyers' Co-operative edition, 468.]

Harris v. *Dennie*, 3 Id. 301–2. [Id. 687.]

Craig v. *State of Missouri*, 4 Id. 427–9. [Id. 909–10.]

The Lessor of Fisher v. *Cockerell*, 5 Id. 256. [Bk. 820. 117].

Crowell v. *Randell*, 10 Id. 392, 396, 397, 398. [Bk. 9. Id. 467, 469, 470.]

Armstrong v. *Treas'r of Athens' County*, 16 Id. 285, 286. [Bk. 10. Id. 967.]

Bennett v. *Butterworth*, 11 How. 676. [Bk. 13. Id. 862.]

Calcote v. *Stanton*, 18. Id. 243–5. [Bk. 15. Id. 349.]

Suydam v. *Williamson*, 20. Id. 427–442. [Id. 980.]

Medberry v. *State of Ohio*, 24 Id. 413–415. [Bk. 16 Id. 739.]

Bridge Proprietors v. *Hoboken L. & I. Co.*, 1 Wall, 116–155. [Bk. 17. Id. 575, 576.]

Rector v. *Ashley*, 6 Id. 142–152. [Bk. 18 Id. 734.]

Furman v. *Nichol*, 8 Id. 44–64. [Bk. 19 Id. 375.]

Aldrich v. *Ætna Ins. Co.*, Id. 491–497. [Id. 475.]

Maguire v. *Tyler*, Id. 650–668. [Id. 324–5.]

Klinger v. *State of Missouri*, 13 Id. 257-263. [Bk. 20 Id. 637.]

Delmas v. *Merchants' Ins. Co.*, 14 Id. 661-670. [Id. 759.]

Bolling v. *Lersner*, 1 Otto. 594-596. [Bk. 23 Id. 366, 367.]

Murray v. *City Council of Charleston*, 6 Id. 432-449. [Bk. 24 Id. 761-2.]

Detroit City Railway Co. v. *Guthard*, 114 U. S. 133-137. [Bk. 29 Id. 118-19.]

Fire Association of Phila. v. *New York*, 119 U. S. 110-129. [Bk. 30 Id. 346.]

Curran v. *State of Arkansas*, 15 How. 320. [Bk. 14 Id. 713.]

Moreover, the judgment of that Court, to which the 6th and 7th alleged errors relate, involving the constitutionality of the act in its entirety, as affected by the guaranty of "due process of law," expressed in article 5 and article 14, sec. 1 of the amendments to the constitution of the United States—*necessarily includes* a decision of the question—is the act inimical to that guarantee, and therefore not "the law of the land?

Wilson v. *Blackbird Creek Marsh Co.* 2 Pet. 251. [Bk. 7. Co-op. ed. 414.]

Crowell v. *Randell*, 10 Id. 392, 396, 397, 398. [Bk. 9 Id. 467, 469, 470.]

Bennett v. *Butterworth*, 11 How. 676. [Bk. 13 Id. 862.]

Medberry v. *State of Ohio*, 24 Id. 413. [Bk. 16 Id. 739.]

Bridge Proprietors v. *Hoboken L. & I. Co.*, 1 Wall, 116. [Bk. 17 Id. 576.]

Rector v. *Ashley*, *supra*.

Furman v. *Nichol*, *supra*.

Aldrich v. *Ætna Ins. Co.*, *supra*.

Smith v. *Adsit*, 16 Wall, 185-190. [Bk. 21 Id. 310, 311.]

Chicago Life Insurance Co. v. *Needles*, 113 U. S. 574-585. [Bk. 28 Id. 1086-7.]

Murdock v. *Mayor, etc., of Memphis*, 20 Wall, 590-642. [Bk. 22 Id. 444.]

Arrowsmith v. *Harmoning*, 118 U. S. 194-196. [Bk. 30 Co-op. ed. 243.]

The merits:

First alleged error:—

The husband's right to the land of the wife, by virtue of the marital relation, is of the dignity of a freehold; being an estate for life, subject to be divested before death, by only divorce *a vinculo*.

1 Bouv. Law Dic., title, "Freehold."

Van Duzer v. *Van Duzer*, 31 Am. Dec. 260. [6 Paige Ch. 370-1.]

2 Kent's Com. p. 130

Junction Railroad Co. v. *Harris*, 68 Am. Dec. 619-20. [9 Ind. 184.]

Reeve's Domestic Relations, Ch II. p. 27.

After this estate has become fixed, that is the wife becoming the owner of the land in fee, no legislative act can divest the husband's right. If

such an act be passed, the husband, *for himself*, may, by acquiescence, give such effect to the act, that he will be estopped thereafter, to assert his right; but this acquiescence of the husband, could not affect antecedent rights of his creditors.

Strong v. *Clem*, 74 Am. Dec. 204 [12 Ind. 37.]

Westervelt v. *Gregg*, 62 Id. 165-6. [12 N. Y. (2 Kernan) 202]

The husband's right to all the expectancies of the land, while the marital relation continues, is as much a *vested* right, as that which he would have to the estate in the land itself during the same term. That the specific property levied on, and which is claimed by the next friend as issues of the land, was not in *being* at the time the act was passed, can make no difference as to its liability.

Heath v. *Bishop*, 55 Am. Dec. 655 [4 Rich. Eq. 46.]

Westervelt v. *Gregg*, *supra*, 163-4.

Graff v. *Bonnett*, 88 Am. Dec. 238. [31 N. Y. 9.]

McIlvaine v. *Smith*, 97 Id. 302. [42 Mo. 45]

Low v. *Pew*, 11 Am. Rep. 359 [108 Mass. 347.]

Everman v. *Robb*, 24 Id. 686-7. [52 Miss. 653.]

Lucas v. *Rickerich*, 1 Lea 728.

Graves v. *Dolphin*, 1 Simons, 66.

Piercy v. *Roberts*, 1 Mylne & K. 4.

Lear v. *Leggett*, 2 Simons, 479.

Shee v. *Hale*, 13 Ves. 404.

Brandon v. *Robinson*, 18 Id. 433.

2 *Kent's Com.* note *e* (2nd note *e*) to p. 468.

And see *Butt* v. *Ellett*, 19 Wall, 544-547, [Bk. 22, Co-op. ed. 183-4.

Watkins v. *Wyatt*, 9 Baxter, 255, 256.

Second alleged error:—

It is conceded that the single condition expressed in this item—indebtedness of the husband at the time the act was passed—would not necessarily involve error, therefore, as an integral error, it is not insisted on except so far as it incorporates with subsequent alleged errors by references there made.

Third alleged error:—

No one of the constituents to give validity to the claim of the creditor in this case, is wanting under this assignment—the marriage—the ownership by the wife of the land—the subsisting indebtedness of the husband—all co-existent at the time the act was passed. Authority seems redundant to sustain the creditor's right to subject the issues of the land to satisfy his debt. If *out of favor to the wife*, rather than to establish an exemption to the husband, the State Court held the act constitutional, it would nevertheless, be amenable to the constitution, because of its *results*; and must be accordingly reprehended. The act could not withdraw from the creditor, that which, when the debt against the husband was contracted, would have stood, of right, fairly liable at law, to satisfy it.

McCracken v. *Hayward*, 2 How. 612. [Bk. 11, Co-op. ed. 399.]

Hathorn v. *Calef*, 2 Wall, 10-24. [Bk. 17 Id. 778-9.]

United States v. *City of Quincy*, 4 Id. 535-55, [Bk. 18 Id. 408, 409-10.]

Gunn v. *Barry*, 15 Wall, 610-24, [Bk. 21 Id. 214-215.]

Walker v. *Whitehead*, 16 Id. 314-18, [Id. 358.]

Rees v. *City of Watertown*, 19 Id. 107-125, [Bk 22 Id. 76.]

Johnson v. *Fletcher*, 28 Am. Rep. 388-92 [54 Miss. 628.]

Westervelt v. *Gregg*, *supra*, p. p. 163-4, 165-6.]

Lasly v. *Phipps*, 13. Am. Law Reg (N. S) 239 [*Lesley* v *Phipps*, 29 Miss. 790]

Mitchell v. *Sevier*, 9 Hump. 146-151.

Greenfield v. *Dorris*, 1 Sneed 548-53.

The foregoing alleged errors are all directed to the decision of the State Court, as relates to its *favor to the wife* specifically.

Fourth alleged error:—

This is directed to the decision of the State Court, as relates to its *favor to the husband* debtor, as are also the alleged errors here following.

An analysis of the act shows it to be nothing more than an *exemption* act in favor of the *husband*, with proviso that the wife may, in writing, waive the exemption right. The husband's right to *control* and *dispose* of the issues of the land, for his own use, is in no way *abridged*. Even the tolerance, (as against antecedent debts) that exemption laws, have in some instances been treated with, by courts, can not brook so flagrant an attempt to deprive the creditor of the subjects to satisfy his debt that originated before the exemption act. The act in such case, must in its application "impair the obligation of contracts."

Bronson v. *Kinzie*, 1 How 319 [Bk. 11 Co-op. ed. 146.]

Hathorn v. *Calef*, 2 Wall, 10-24 [Bk. 17 Id. 778-9.]

United States v. *City of Quincy*, *supra*.

Gunn v. *Barry*, *supra*.

Edwards v. *Kearzey*, 6 Otto. 595-611 [Bk. 24 Co-op. ed. 797, 799.]

Louisiana ex rel. *Ranger* v. *City of New Orleans*, 12 Otto. 203-7 [Bk. 26 Id. 133.]

Bruce v. *Schuyler*, 46 Am. Dec. 457-8 [4 Gilman, 221.

Western Savings Fund Society v. *Philadelphia*, 72 Am. Dec. 734-5 [31 Penn. St. 175.]

Penrose v. *Erie Canal Co.*, 93 Id. 779, 780 [56 Penn. St. 46.]

The Homestead Cases, 12 Am. Rep. 515 [22 Grattan 266.]

Neelly v. *Lancaster*, 58 Id. 755 [47 Ark. 175.]

Harris v. *Austell*, 2 Baxter 149-50.

Fifth alleged error:—

"Due process of law," as used in the 5th amendment, and in section 1 of the 14th amendment, to the constitution of the United States, has the same import as the phrase "law of the land." The latter frequently occurs in State constitutions. The two phrases are regarded as equivalents.

Den. ex. dem. Murray v. *Hoboken L. & I. Co.*, 18 How. 272-86 [Bk. 15 Co-op. ed. 374.]

Davidson v. *Board of Adm'rs of New Orleans*, 6 Otto. 97-108 [Bk. 24 Id. 618.]

The Tennessee act of 1879, when divested of its ostensible feature of *favor to the wife*, is essentially an exemption act *in favor of the husband*, with the additional proviso, that the *wife* may, in writing, waive the exemption. The property remains that of the husband.

Two results would follow such law, either of which, by constitutional tests, must be fatal to it. (1) As an *exemption* law in favor of the husband, it would be *partial*, and its discrimination not

founded on any political, industrial or economic reason, such as is taken to support such a law, and exists in case of mechanics of a particular craft, of persons engaged in agriculture and the like; but it would rest alone on the *accident* of the wife being the owner of land, the issues from which, by the marital right, are secured to the husband. (2) The other result, such a law would enable the husband to hold *absolutely*, property that could not be subjected to satisfy debts against him. Both of which results would be obnoxious to the well settled policy of the fundamental laws of these States, and violative of "the law of the land," as the latter is designated by "due process of law" in the constitution of the United States.

As to laws that are unequal in their effect, see

Jones v. *Perry*, 30 Am. Dec. 433-4, 440 [10 Yer. 71, 72, 78, 79.]

Regents of University of Maryland v. *Williams*, 31 Am. Dec. 99 [9 Gill & J. 365.]

City of Shreveport v. *Levy*, 21 Am. Rep. 553 [26 La. Ann. 671.]

Pearson v. *City of Portland*, 31 Id. 277 [69 Maine 278.]

State ex. rel. Tieman v. *City of Indianapolis*, 35 Id. 226 [69 Ind. 375.]

Vanzant v. *Waddel*, 2 Yer. 260.

Walley v. *Kennedy*, Id. 555–6.

Bank of the State v. *Cooper*, Id. 607–8.

Mayor, etc., *of Nashville* v. *Althrop*, 5 Cold. 560.

Cooley on Taxation, 153.

As to laws that would allow a debtor to hold property absolutely, and yet shield it from liability to satisfy debts against him, see

Hallett v. *Thompson*, 5 Paige Ch. 586, 587.

Heath v. *Bishop*, *supra*, p. p. 655, 658, 661.

2 Story's Eq. Juris, Sec. 974 *a*.

Sixth alleged error:—

The 5th above and this 6th are nearly the same, as the two provisions of the constitution that they invoke are almost the same. The 5th amendment, as to this is a guard, expressed by way of constitutional *assurance* to all the people, that it is only by "due process of law" that they may be deprived of their property; this general and universal admonition is rather, in form of expression, a *pledge* by the general government to the *people* of the nation; while the provision in sec. 1 of the 14th amendment is the mandate of the general government to the *States* of the Union, forbidding "any State" to so deprive "any person."

Pearson v. *City of Portland*, *supra*.

Mayor, etc., *of Alexandria* v. *Dearmon*, 2 Sneed 121–5.

It does not follow, because an act of the Legislature is such, that it is "the law of the land," or that its application and effect would be necessarily in accordance with "due process of law."

Davidson v. *Board of Adm'rs of New Orleans*, *supra*. [Bk. 24 Co-op. ed. 619.]

Hoke v. *Henderson*, 25 Am. Dec. 688 [4 Devereaux's Law 1.]

Taylor v. *Porter*, 40 Id. 278 [4 Hill 140.]

Regents of University of Maryland v. *Williams*, *supra*, p. p. 97, 99-100, 102. and see Mr. Webster's definition in

The Trustees of Dartmouth College v. *Woodward*, 4 Wheat. 581 [Bk. 4 Co-op. ed. 645.]

J. A. Reese,
Counsel for plff. in error.

Hallett v. *Thompson*, 5 Paige Ch. 586, 587.

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The Trustees of Dartmouth College v. *Woodward*, 4 Wheat. 581 [Bk. 4 Co-op. ed. 645.]

F. A. Reese,
Counsel for plff. in error

[redacted]

[redacted]

[redacted]

Record, Case No. 13,481.

BAKER, IN ERR.

v.

KILGORE, NEXT FRIEND, ET AL.

McKee's Argument for Pl'ff in Error.

United States Supreme Court.

Jurisdiction of this Court:—

Two grounds of repugnance to the Constitution of the United States are urged against the act—taking its meaning to be as the State Court has declared—(1) that it would "impair the obligation of contracts"; (2) that to exempt from liability the property claimed for Mrs. Scruggs would be to "deprive" the creditor of the husband, of his "property without due process of law."

I submit that both these questions are presented in such way that they will be judicially recognized, and this Court will accordingly appropriate the cause and exercise jurisdiction.

Is the question of impairing obligation of contract presented?

Introductory to the attempt to answer this question, two facts must be noticed—(1) in this case the wife acquired one tract, (the largest, more than half the whole) of the lands, before the act was passed.

Record, side p. 18.

(2) This cause originated before a Justice of the Peace.

Record, side p. p. 3, 6.

In Tennessee, written pleadings are not required before such a court, but are *ore tenus*.

Wood v. *Hancock*, 4 Hump. 465, 467.

There is no proof that the cattle (the property levied on) issued particularly from the subsequently acquired land, but only from the lands as a *whole*, all being occupied in the same way and under common management.

Record, side p. p. 19–22.

As submitted in my brief, the wife in such case, must show *affirmatively*, that the property levied on was hers or that it was exempt; the presumption is against her, and if she has permitted intermixture of the exempt property or her own property with that which is not so, the exemption is lost as to the whole.

Seitz v. *Mitchell*, 4 Otto. 580–86 [Book 24 Lawyer's Co-operative edition 180.]

Bergey's Appeal, 100 American Decisions, 582-3 [60 Penn. State 408.]

McCoy v. *Brennan*, 1 American State Reports, 591 [61 Mich. 362.]

Shirley v. *Shirley*, 9 Paige's Ch. 364, 365.

Glidden v. *Taylor*, 91 Am. Dec. 101 [16 Ohio State 509.]

Robinson v. *Holt*, 75 Am. Dec. 233 [39 N. H. 557.]

The State Courts do not find that any of the property issued from the land acquired subsequent to the act of 1879; and the judgment of the State Supreme Court is rested alone, as to this, upon its view that the act is not, in such

case, repugnant to the Constitution of the United States, when applied to issues of land acquired before the act.

Craig v. *State of Missouri*, 4 Peters, 427–9 [Bk. 7 Co-op. ed. 909.]

Lessor of Fisher v. *Cockerell*, 5 Id. 256 [Bk. '8 Id. 117.]

Crowell v. *Randell*, 10 Id. 392 [Bk. 9 Id. 467.]

Delmas v. *Merchants' Ins. Co.*, 14 Wall, 661–70 [Bk. 20 Id. 759.]

Then the case stands as if *all* the lands had been acquired by the wife before the act. This ground of constitutional objection, though two-fold—antecedent acquisition by the wife and antecedent contract by the husband—for the purposes of this argument as to jurisdiction, need be considered in only its wholeness, and not upon the distinct grounds alleged.

This constitutional question is presented by the record as it was when the cause was heard by the State Supreme Court, (1) by the fact that the issues were of land formerly acquired; (2) by the judgment of the State Circuit Court, (3) by 2nd alleged error in the assignment made in the State Supreme Court.

Record, side p. p. 19-22, 31.

True that 2nd alleged error does not name either the Constitution of Tennessee nor that of the United States, as the one to which the act is repugnant; the words that express the provision in each Constitution are the same—"law impairing the obligation of contracts."

Const. of Tennessee, Act 1, sec. 20.

I submit, if this repugnance exists to *both*, it would not affect the question of this Court's jurisdiction, and if only to the Constitution of the United States, then this error could have referred only to the latter.

But the judgment itself of the State Supreme

Court, I submit, is sufficient to give this Court jurisdiction; because that judgment, without referring to any other ground upon which to rest, is placed alone upon its declaration that, in case where all the three conditions—marriage, ownership of the land by the wife, and subsisting liability of the husband—concur and co-existat the time of the enactment, that in such case the act applies. Then if all parts of the record, relating to this question, before this judgment of the State Supreme Court were disregarded, that judgment itself fully presents the question, and in such way as that the question was deemed by that Court conclusive of the rights involved in the cause.

Satterlee v. *Matthewson*, 2 Pet. 410 [Bk. 7 Co-op. ed. 468.]

Crowell v. *Randell*, *supra*, p. p. 396, 398 [Bk. 9 Id. 469, 470.]

Armstrong v. *Treasurer of Athens County*, 16 Id. 285, 286 [Bk. 10 Id. 967.]

Bridge Proprietors v. *Hoboken L. & I. Co.*, 1 Wall, 116–155 [Bk. 17 Id. 576.]

Rector v. *Ashley*, 6 Id. 142–152 [Bk. 18 Id. 734.]

Furman v. *Nichol*, 8 Id. 44–64 [Bk. 19 Id. 375.]

Klinger v. *State of Missouri*, 13 Id. 257–263 [Bk. 20 Id. 637.]

Curran v. *State of Arkansas*, 15 How. 320–1 [Bk. 14 Id. 713.]

"The question must have been raised," as it was "decided, in order to induce the judgment."

Commercial Bank of Cincinnati v. *Buckingham's Extrs.*, 5 How. 361 [Bk. 12 Id. 181.]

The question was in fact decided.

Bolling v. *Lersner*, 1 Otto. 494–6 [Bk. 23 Id. 367.]

Murray v. *City*, etc., *of Charleston*, 6 Id. 432–449 [Bk. 24 Id. 761–2.]

Detroit City Railway Co., v. *Guthard*, 114 U. S. 133–7 [Bk. 29 Id. 118–19.]

No other ground in the record affords any legal basis for the judgment of the Supreme Court.

Maguire v. *Tyler*, 8 Wall, 650–68 [Bk. 19 Id. 324–5.]

Where the "opinion of the State Court" is incorporated in the record of the judgment *itself*, it must be sufficient.

Gross v. *U. S. Mortgage Co.*, 108 U. S. 477–90 [Bk. 27 Id. 797, 798.]

Fire Association of Philadelphia v. *City of New York*, 119 U. S. 110–29 [Bk. 30 Id. 346.]

The other constitutional ground—that the act is not one which the Legislature is impowered to pass, because it would be a breach of guarantee of the Constitution of the United States of "due process of law," and the Legislature by passing the act, attempts to do that which a State is forbidden by the Constitution of the United States, to do. This constitutional question goes to the act in its *wholeness*, and thereby the question is presented—does this act consist with "due process of law"? or in the words of the other formula, is it "the law of the land"?

Wilson v. *Blackbird Creek Marsh Co.*, 2 Pet. 251 [Bk. 7 Co-op. ed. 414.]

Harris v. *Dennie*, 3 Id. 301–2 [Bk. 7 Id. 687.]

Armstrong v. *Treasurer of Athens County*, *supra*, p. 285 [Bk 10 Id. 967.]

Medberry v. *State of Ohio*, 24 How. 413–15 [Bk. 16 Id. 739.]

Bridge Proprietors v. *Hoboken L. & I. Co.*, *supra*, [Bk. 17 Id. 575, 576.]

Aldrich v. *Ætna Ins. Co.*, 8 Wall, 491–7 [Bk. 19 Id. 475.]

Smith v. *Adsit*, 16 Id. 185–90 [Bk. 21 Id. 310–11.]

Chicago Life Ins. Co. v. *Needles*, 113 U. S. 574–85 [Bk. 28 Id. 1086, 1087.]

The merits:—

The assignment of errors waives the question—can a law passed after a marriage affect rights that result from that relation as the law stood at the time of marriage? These suggestions however are offered.

The marital right of the husband to present enjoyment of the wife's real estate arises instantly on marriage—whether she then owns land or not, the *right* of the husband exists, though the subject to which that right will attach would not come within its reach until the wife acquires title. I might submit that, in case where there is *no change of domicil*, the right of the husband to future acquisitions of the wife, remains as fixed by law at the time and place of the marriage.

Story on Conflict of Laws, Ch. 6, sec. 187, (4).

An important distinction may exist here between dower right and this marital right of the husband; especially where, as in Tennessee, the widow is dowable out of only the land of which "her husband died, seized and possessed, or of which he was equitable owner."

Milliken & Vertrees (Tenn.) *Code* sec. 3244.

And the widow has no estate until assignment of dower.

Cox v. *Jagger*, 14 Am. Dec. 525, [2 Cowen, 638.]

Whyte v. *Mayor of Nashville*, 2 Swan, 367.

Melizet's Appeal, 55 Am. Dec. 573 [17 Pa. St. 449.]

1 *Greenleaf's Cruise*, 168.

4 *Kent's Com.* 62.

The one is a present right of immediate enjoyment—the other only an *inchoate* right to future enjoyment, and the latter dependent, moreover, upon the two contingencies of survival of the wife, and lands owned by the husband at his death.

Hence, dower may depend on the law in force at the husband's death.

Strong v. *Clem*, 74 Am. Dec. 203 [12 Ind. 37.]

Sutton and wife v. *Askew*, 8 Am. Rep. 501–4 [66 N. C. 172.]

And yet the husband's estate *jure mariti*, will be governed by the law as it was at the time of marriage.

White v. *White*, 5 Barb. 474.

Snyder v. *Snyder*, 3 Id. S. C. Rep. 621.

Holmes v. *Holmes*, 4 Id. 296.

Watson v. *Bonney*, 2 Sandf. (Law) 405, and see

2 *Kent's Commentaries*, 130.

Pritchard v. *Citizens' Bank*, 28 Am. Dec. 133-4 [8 La. 130.]

Van Duzer v. *Van Duzer*, 31 Am. Dec. 260 [6 Paige Ch. 370.] See *Cooley's Const., Lim.*, side p. 361.

In the opinion in *Sutton* and wife v. *Askew*, supra, is an interesting and pertinent discussion of the subject of vested rights of the husband in his own land, when the right of the wife under legislative enactment in her favor is asserted thereto, as in case of dower—and see

Lyon v. *Knott*, 26 Miss. 458.

It has been declared that "whatever occurs to the wife during the coverture, the law gives to the husband the same right over the real estate and chattels real as if they belonged to her before marriage, and the same absolute power over any personal estate or interest accruing to the wife by gift, devise or otherwise."

Burleigh v. *Coffin*, 53 Am. Dec. 237 [22 N. H. 118.]

Reeve, in his *Domestic Relations*, says: "By marriage, the husband acquires the usufruct of all the freehold estate of the wife, that is to say, of all her lands, tenements, and hereditaments, which she has in fee simple, fee tail, or for life, during the coverture. This estate is a freehold estate in the view of the law, being an estate for life, since it may by possibility last during his life; and having no certain determinate period." *Side page* 27.

Up to the time the act of 1879 was passed, the husband could have leased the wife's estate for years for any limit within that of the estate for years, it being a chattel real; and if he had died the next day, the rents would have been due his personal representative and not to his widow. (The act of 1879 includes, for the first time in Tennessee legislation of this character, the wife's estate for years.)

Reeve's Domestic Relations, side p. 24.

And such estate might have been taken in execution for debts against the husband.

Ibid, *side p.* 26.

The husband may waive his right, as fixed by law at marriage, as to lands acquired by the wife before the act, as well as after it, by acquiescence, and thus estop himself to deny the right of the wife.

Embury v. *Conner*, 53 Am. Dec.327, and notes, [3 N. Y. (3 Comst.) 511.]

But this could not prejudice his creditor. Doubt has been expressed whether an ostensible right under an unconstitutional act, can be validated by acquiescence of the party deprived.

Regents University of Maryland v. *Williams*, 31 Am. Dec. 102 [9 Gill & Johns, 365.]

As to this single question (of marriage antecedent of the act,) we need not further inquire in case where the marriage, the acquisition of land by the wife, and the contract of the husband, *all ante-date* the act.

To take up the alleged errors *seriatim*:—

The first presents the case of marriage and ownership of land by the wife, both subsisting at the time of the enactment. Here the husband's right to the profits, *etc.*, of the land during coverture, has accrued, and also attached to the specific subject itself of the right, and it could not be devested.

Junction Railroad Co. v. *Harris*, 68 Am. Dec. 619–20 [9 Ind. 184.]

Coffin v. *Rich*, 71 Id. 566 [45 Maine 507.]

Strong v. *Clem*, 74 Id. 204 [12 Ind. 37.]

Hockaday v. *Sallee*, 26 Mo. 219.

Hawey v. *Wickham*, 23 Id. 112.

The rents and profits were liable for the husband's indebtedness at the time the act was passed, and must continue so.

Graff v. *Bonnett*, 88 Am. Dec. 238 [31 N. Y. 9.]

Sleight v. *Reed*, 18 Barb. 159.

Vartie v. *Underwood*, Id. 561.

Blood v. *Humphrey*, 17 Id. 660.

Benedict v *Seymour*, 11 How. Practice, 176.

Westervelt v. *Gregg*, 62 Am. Dec. 162, 163, 165 [12 N. Y. (2 Kernan) 202.]

It is axiomatic in law, that a debtor cannot, by his uncompensated voluntary act, divest himself of his assets, to the injury of his creditor. True this disability of the debtor rests upon a presumption of fraudulent intent, or, if the actual fraudulent intent cannot be presumed, then the analogy to a case of fraud is taken, and the same axiomatic rule holds. The principle is the same, in its essential, as that which underlies the case to which this alleged error points.

At the time the act was passed, the debtor, by his authenticated signature and seal with delivery of his deed, would not have been permitted, to the hurt of his creditor, to consummate that which the *act* assumes to do for him. Or, viewing the act as *of favor to the wife*, the husband would not then have been permitted in the same way, to have transferred gratuitously to the wife, the issues of the land; and yet the *act* assumes to do for the wife, that which would be fraudulent if attempted by the husband himself.

Stehman v. *Huber*, 21 Penn. St. 260.

Here it may be remarked, that the *acquiescence* of the husband in a devestiture of his right, could no more affect the right of his subsisting creditor, than could his gratuitous transfer to his wife, before the act.

The creditor may subject such property as was not exempt when the contract was entered into.

Harris v. *Austell*, 2 Baxter, 149–50.

Bronson v. *Kinzie*, 1 How. 319 [Bk. 11 Co-op. ed. 146.]

McCracken v. *Hayward*, 2 Id. 612 [Id. 399.]

Planters' Bank v. *Sharp*, 6 Id. 328 [Bk. 12 Id. 459.]

Hathorn v. *Calef*, 2 Wall, 10–24 [Bk. 17 Id. 778, 779.]

United States v. *City of Quincy*, 4 Id. 535–555 [Bk. 18 Id. 408.]

The Homestead Cases, 12 American Reports, 520 [22 Gratt, 266.]

Where claims of creditors are involved, retrospectiveness of effect, will not be allowed even to the Constitution of a State.

Edwards v. *Kearzey*, 6 Otto. 595–611 [Bk. 24 Co-op. ed. 798.

Girdner v. *Stephens*, 1 Heisk, 280.

The second alleged error, presents the case of only indebtedness of the husband antecedent to the act, and it is conceded, that without the concomitant of antecedent marriage also, this would be unavailing for the creditor, and therefore, as an integral error it is not insisted on; but its ground is relied on so far as it is referred to and incorporates with the subsequent alleged errors.

The third alleged error, enumerates a trinity of conditions existing in this case—the two conditions named in the first alleged error being increased by that of indebtedness of the husband at the time the act was passed. What ever may be the view of the constitutionality of the act in a case presenting only the two conditions named in the first item alleged, I submit, that, with this antecedent right of the creditor brought "elbow to elbow" with the act, its unconstitutionality for attempting to impair the obligation of contracts must be manifest.

I am still, it must be observed, contemplating the act as passed *out of favor to the wife*. Upon

this point I may say, no matter how strong the tendency of modern legislation, to favor the wife in her property interests, and to disenthrall her estates from the husband's liability, and though this tendency of legislation may be inspired by an enlightened sense of right, and the spirit which prompts it be in harmony and due ratio with the domestic, social and political progress of the time—and it may be conceded that this legislative liberality to the wife should in no wise be rebuked—yet it must not be permitted to go the chivalrous length, in case of the husband's creditor, of depriving him of a right that rests on well settled principles of constitutional law, and is in fact a vested right. Hence, though the design of the act may be to *favor the wife*, if its *effect* be to *wrong* the creditor of the husband, it must be arraigned by the Constitution, and if it can not pass the tests to which the Constitution subjects it, then the act must at last fall.

Chief Justice *Taney*, speaking for this Court, in *Bronson* v. *Kinzie*, *supra*, (p. 318) [Bk. 11 Co-op. ed. p. 145] said of this clause of the Constitution—"it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life."

The obligation is not to be impaired at all.

Planters' Bank v. *Sharp*, 6 How. 327 [Bk. 12 Co-op. ed. 458.]

Green v. *Biddle*, 8 Wheat. 84 [Bk 5 Id. 568.]

United States v. *City of Quincy*, *supra*, [Bk. 18 Id. 409–10.]

Whenever the "result [of impairing the obligation] is produced by the act," the contract must be taken under the shield of the Constitution.

Walker v. *Whitehead*, 16 Wall, 378–90 [Bk. 21 Id. 858.]

A valid contract at the time and place it was entered into, can not be annulled by the Legislature.

White v. *Hart*, 12 Wall, 646–54 [Bk. 20 Co-op. ed. 685.]

Delmas v. *Merchants' Ins. Co.*, 14 Wall, 661-70 [Bk. 20 Id. 759.]

Walker v. *Whitehead*, *supra.*

Bruce v. *Schuyler*, 46 Am. Dec. 457 [4 Gilman 221.]

The means to enforce a contract must not be withdrawn.

Penrose v. *Erie Canal Co.*, 93 Am. Dec. 779 [56 Penn. St. 46.]

The right includes every thing within the "obligatory scope" of the contract. The obligation can not be substantially impaired in any way by a State law. The remedy is part of the obligation, and may not be changed so as to lessen the value of the contract.

Edwards v. *Kearzy*, *supra*, [Bk. 24 Co-op. ed. p. p. 796, 797.]

The right of the creditor to a "substantial and efficient remedy * * * is as much within the protection of the Constitution, as the obligation of the contract."

Bruce v. *Schuyler*, *supra*, p. 459.

"Validity and remedy are inseparable," and it is "the right of the creditor to enforce payment."

The Homestead Cases, *supra*, p. 515.

The parties to a contract may be considered as referring to the law for its enforcement.

Lasly v. *Phipps*, 13 American Law Register, (N. S.) 239 [*Lesley* v. *Phipps*, 49 Miss. 790.]

"The lesson of the adjudications is, that the creditor may trust to the law as it is when he contracts, to know how much of the estate of the debtor he may look to for satisfaction."

Ibid, p. 241.

The fourth alleged error presents the act in its aspect of *favor to the husband*; it is when viewed in this aspect, I submit, that its true *legislative* intent (whatever may have been that of the individuals who passed it,) appears.

The act is but an ordinary exemption act in favor of the husband, with the (practically worthless) qualification mentioned in my brief, that the wife may, in writing, waive the exemption that the act affords the husband. The husband himself is not permitted to waive it, though he is not otherwise restrained from disposing of the property in any way for his own use and benefit, nor indeed from giving it away. It will thus be seen, that—except as to the qualification named—this act does not differ from the exemption laws in general in Tennessee; where the husband "can not waive his right, and permit a levy and sale of the property by execution."

Denny v. *White*, 2 Cold. 286–7.

It is declared in the same State that, the husband can not be restrained from disposing of the exempt property.

Cox. v. *Ballentine*, 1 Baxter, 364.

Denny v. *White*, *supra*, p. 287.

I here more particularly notice the act under consideration, and in connection with it the act of Tennessee of 1849–50, the last named relating to the husband's interest in the *land itself*.

Laws of Tennessee, 1849–50, Chap. 36, p. 111. which is carried into the Code of 1884.

M. & V. Code, sec. 3338.

These acts, it will be observed, both leave the *husband's right* and *title* unaffected as these stand at common law. The act of 1849–50 deals with the interest of the husband in the intrinsic *land*, assumes to withdraw it from liability for his debts, and forbids sale of it by the husband alone, during the wife's life. Thus, that act is only an exemption and restraint of the husband, to alien, and does not touch the husband's right.

The act of 1879 deals with only "the rents and profits" of the wife's land, contains no restraint from aliening, only exempting the issues from liability for the husband's indebtedness; and, like the act of 1849–50, leaves the husband's *right* intact.

Both these acts are in derogation of the common law; therefore, subject to the rule of strict construction. Except where the Statute is express to the contrary, the husband's right to, and in the wife's land remains according to the common law—an estate in the land with the right to its products and profits during coverture. So expressly declared in Tennessee.

Russell v. *Colyar*, 4 Heick, 159–60, 161, 162.

Horne v. *Memphis & Ohio R. R. Co.*, 1 Cold. 77.

And in other States.

Neelly v. *Lancaster*, 58 Am. Rep. 755 [47 Ark. 175.]

And, in Tennessee, it has been expressly declared, that the act of 1849–50, does not affect the husband's right *jure mariti*, to receive the profits of the wife's land.

Lucas v. *Rickerich*, 1 Lea. 728.

We thus reach a clear conclusion, that the husband, as to his *enjoyment*, has in Tennessee just the same right in and *benefit* from his wife's land that the common law gives him.

It is, of course, not controverted that the Legislature can make a law altering the common law

as to the husband's rights of the wife's land, by declaring that the husband should have no *estate* in the land itself, nor any *right* to the profits from it during coverture, as has been done by some authorities, for instance by Congress in legislating for the District of Columbia.

Revised Stat. for Dist. Columbia, sec. 727.

and which statute received construction in *Hitz* v. *National Metropolitan Bank*, 111 U. S. 722-33 [Bk. 28 Co-op. ed. 580.]

The Tennessee Legislature might have passed such an act, abolishing the husband's right *in toto* to the estates of the wife, when either the act of 1849-50, or that of 1879 was passed; but it is plain that it did not. It leaves the husband's estate in the lands only impaired by forbidding him to convey without the concurrence of his wife, and leaves his right to receive and enjoy the profits in all its common law vigor, but assumes to exempt these profits as *his own*, not because of any pretence that they are those of his *wife*. As to a similar act in Maryland, see *Anderson* v. *Tydings*, 63 Am. Dec. 713 [8 Md. 427.

It may be remarked, that the act of 1879, is an anomaly among exemption acts; inasmuch as it leaves the husband the absolute owner of the rents and profits of the wife's land, and yet accords to *her alone*, power to waive the exemption of them from the husband's liabilities. It is not to be supposed that these issues, even on such waiver by the wife, could be rendered liable for her separate debts, where the husband himself is not liable; yet the *husband*, as declared in the Tennessee authorities above cited, can not waive the exemption as to his own debt, and *a fortiori* he could not waive the exemption as to his wife's debt. Strange results in Tennessee, might follow from this clause of the act permitting the wife to waive the exemption that it assumes to

create; it would, in effect, make the wife, in some sort, the auditor of all claims against her husband—subject his creditor's right entirely to the pleasure of the wife as to such issues, and permit her according to favor or whim to waive as to one and deny as to another equally just. The confusion and uncertainty that would thus result, would be intolerable in any community having commercial and business intercourse and regulations. Other perplexing results must follow from this proviso for waiver, that space will not permit notice of.

We may then say with confidence, that where a contract of the husband is involved, the contemporaneous law must be considered in concretion with the husband's liability and right, divested entirely of its aspect of *magnanimity to the wife*. So regarding the act of 1879, this single consideration as to this feature of the act is urged in support of the ground immediately under examination (impairing the obligation of contracts) of alleged unconstitutionality—that consideration is, because the act is *indefinite* as to the amount or extent of exemption in behalf of the debtor-husband—no uniform measure being afforded by it, so as to ascertain the limit of its sheltering reserve—therefore, in its general application, cases must arise where the amount exempt, as against antecedent contracts, would exceed the utmost limit contemplated by any constitutional or reasonable ground upon which exemption laws can be sustained. A man so lucky as to marry a woman who owned valuable landed estate of large annual income, would be enabled to roll in luxury on an income of thousands from his wife's land, no dollar of it be liable for his indebtedness, and yet *all his own absolutely;* while another man, less fortunate, marries a woman who at no time during coverture owns land, and is stinted, his life through, down to the "water line" of ordinary exemptions, by the demands of his creditors. This argument has its place in support of the subsequent proposition, but is submitted here as showing, that in

the application of such a law, the amount, that in particular cases, would be exempt, would materially lessen the *value* of the contract, and hence the act would, in such case, be one impairing the obligation of contracts.

Planters' Bank v. *Sharp*, 6 How. 327 [Bk. 12 Co-op. ed. 458.]

Exemption acts are subjected to more rigid judicial scrutiny, and to sustain them under this constitutional test, must have more substantial ground than was formerly deemed sufficient.

Cooley's Const. Limitations, side p. 288.

Mr. *Freeman* in note to *Rockwell* v. *Hubbell's* Adm'rs says, that undoubtedly the exemption of personal property is in derogation of the common law.

45 Am. Dec. 253 [2 Douglass, 197.]

The rule of strict construction before stated would accordingly apply to laws declaring such exemptions.

At this day it may be doubted if such laws can be sustained at all by any sound reason that consists with the sacredness of existing contracts, unless the subjects of exemption be limited to what are *necessaries*—these necessaries not always the same, but nevertheless "necessaries," in their relation to the individual favored—as tools of a person whose regular employment is that of a particular craft among the industries, beasts of burden and implements of one regularly engaged in agricultural pursuits, and the like; or the necessity may with reason be found as a result from the particular domestic relation, and consequent responsibility of the individual, as the head of the household. Sound public policy forbids alike, that the industrial class be made helpless by depriving of its hammer or saw, or the farmer of his plough-horse, and that the larder or clothes-closet of the household be swept

of their needed stores, and its dependents thereby reduced to pauperism.

Jones v. *Williams*, 2 Swan. 106.

Denny v. *White*, 2 Cold. 285.

Such considerations moved this Court—referring to the constitutional power to make exemptions in

Bronson v. *Kinzie*, *supra*, p. p. 315–16 [Bk. 11 Co-op. ed. 145.]

as expressed by the language of its Chief Justice, to declare—"It must reside in every State to enable it to secure its citizens from unjust and harrassing litigation, and to protect them in those pursuits which are necessary to the existence and well being of every community." Referring to this language of *Chief Justice* Taney, Mr. *Justice* Swayne, in

Edwards, v. *Kearzey*, *supra*, [Bk. 24 Co-op. ed. p. 797.]

says—"The learned *Chief Justice* seems to have had in mind the maxim '*De minimis*,' *etc.* Upon no other ground can any exemption be justified." Mr. *Justice* Swayne does not seem disposed to regard "humanity" as a ground on which exemption laws may be rested; but it is likely, that when the dictates of *public policy* and considerations of humanity agree as one, that this ground might be safely, but nevertheless cautiously taken. Upon this language of *Chief Justice* Taney, with that in connection with it—although but *dicta* in that case (but which, as strict authority, I concede would be most correct,)—has been reared a superstructure of legislation and adjudication very far jutting over the basis taken. (See a note of Mr. *Freeman*, abounding in facetiousness, to *Rockwell* v. *Hubbell's* Adm'rs, 45 Am. Dec. p. 253, [2 Douglass, 197.] Perhaps as clear a statement of the true basic-theory of exemption laws, as any to be found is that in

Dennie v. *White*, *supra*, p. p. 286–7.

Also see

Cox v. *Ballentine*, 1 Bax. 364.

The true groun[illegible]on which to rest an exemption in favor of h[illegible]s of families is, perhaps, that such exemptio[illegible]s in the nature of a *trust* for the benefit of [illegible]endents of the householder as well as for himse[illegible] according to the view in *Dennie* v. *White*, supra.

All outside of the circumscribed limit indicated by these authorities must be reprehended. Some inequality must result in the application of any such law, but the *measure itself* of the exemption, can be accurately afforded by the statute.

Before referring to other authorities as to this constitutional question, I may be pardoned for considering briefly—yet somewhat analytically—the "obligation" as meant in the clause in the Constitution against "impairing the obligation of contracts."

Some confusion—at least a want of perspicuity, as well as consistency—seems to exist among and in many authoritative definitions that occur.

United States v. *City of Quincy*, supra, [Bk. 18 Co-op. ed. 409–10.

A close definition by Mr. *Justice* Field occurs in *State of Louisiana*, ex. rel. *Ranger* v. *City of New Orleans*, 12 Otto. 203–7 [Bk. 26 Id. 133.] that the obligation of a contract "is that means provided by law" to enforce it. I may say that *ex vi termini* the phrase necessarily implies duality—two things—*i. e.*, the obligation and the *contract;* the latter is of easy definition, as the concurring will of the parties, evidenced in proper form; the obligation results from the contract, but is itself *integral* in its character, and perhaps is not so easy of definition; but pursuing the analysis—they must bear to each other a due relation; this relation would be inert, and without potency (except in moral sense) but for the law, which supplies the *remedy;* this introduces a new factor with its name, and *it* requires correct definition. In a large majority of instances of contract and obligation, this third fac-

tor—the remedy—is not invoked, because the obligation of the contract is performed without coercion; then it is only *in default* of such uncoerced performance that the remedy is employed. This remedy then, which the law supplies, is the *nexus* that ties the obligation to the contract, and by which, as a last resort, enforced performance of the obligation can be had. If I am correct thus far, it must follow that the remedy is in no proper sense, *either the contract or the obligation*, but has its own individuality, intermediate between the two, and yet reaching both. Hewever roundabout or zig-zag the the connecting lines of the remedy as prescribed by the law, may run, still they must centre at both extremes—one in the contract, the other in the obligation. Then it would seem a confusion of general terms, to define the obligation as embracing the remedy. A jurist of distinction has confessed his perplexity with such definition, (see *McCormick* v. *Rusch*, 83 Am. Dec. 407–8, [15 Iowa 127.]

If we have thus found the obligation to exist in entire distinction from the remedy, we must not not be allowed to regard anything that affects the remedy *merely*, as necessarily affecting the obligation, either to impair or aggravate it, but must by closer proximates to the word itself and its inherencies, find such definition as will accurately portray it in its constitutional sense.

To obtain a satisfactory definition of the obligation—having by this process eliminated the remedy as a definitive—it becomes necessary for a short space, to consider a *contract.*

In every formal contract, there are two important elements—the one springing from the other—which are not expressed, but rest alone in *implication;* they are—*first*, that if its obligation be not performed *sponte facta*, its performance may be *enforced;* this must be so, otherwise the performance could as well be left alone to the moral prompting of "honor" or that of conscience, and the formality of legal contract for

that matter, be dispensed with. The law, if it must be resorted to, cannot, as a part of the remedy, supply the property-subject, to consummate this enforcement; the law can only supply the implement with which it may be done, or the *remedy*, to call it such. Now, we have reached a point in our reasoning *very close* to the obligation, and the *second* implied element in the contract (growing out of that just noticed), at once presents itself, and is this—the obligor *tacitly* covenants, that his property-subjects, for the enforcement of his obligation by the process or remedy which the law affords, shall *stand as at the time of the contract*—of course, leaving him the full privilege—in good faith—to sell, barter, exchange, *etc.*—as expedient for the business interests of the community—any such property-subjects as he then owns, but presupposing, that they, or their equivalents, will be at hand, and under the obligor's proprietorship whenever called for by the law, to enforce the obligation. Thus this element (the obligation) of a contract, *contemplates the property-subject* of the obligor, as it is held by him at the time of the contract, as an *undelivered pledge* or *gage*, to the obligee for the performance of the contract. This result may indeed be reached, by considering the etymology of the word "obligation" itself, which gives the "binding power" as the "obligation" of a contract. See Mr. *Justice* Swayne's analysis in

Edwards v. *Kearzey*, supra, [Bk. 24 Co-op. ed. 796.]

The "binding" of this "power" must have for its subject the obligor himself, in his property interests, (and for a long time it was insisted, that in most of the States, it extended to his personal liberty also, but this was finally overruled by this Court in numerous instances, and inprisonment of the debtors person, held to not be of the obligation.) An excellent exposition of the creditor's relation to the debtor's property occurs in the opinion in *Eppes* v. *Randolph*, 2

Call. (Va.) 183, where *Judge* Pendleton says—"Where a creditor takes no specific lien, he trusts his debtor upon the credit of his property generally, and on a confidence that he will not lessen it to his prejudice. He has, therefore, a claim on all that property whilst it remains in the hands of the debtor, and may pursue it into the hands of a mere volunteer; but not having restrained the debtor's power of alienation, if he or his volunteer convey to fair purchasers, they, having the law and equal equity, will be protected against the creditor." Thus we educe the definition of the obligation of a contract, in its constitutional import, to be, that—*the obligor's assets, as liable at the time of the contract, shall, by his implied agreement, so remain, in the nature of a pledge or gage, until the contract be performed*, and that these assets shall at all times be accordingly subject to the law's exaction and process. Hence to subtract from these assets—except by transfer for valuable consideration and in good faith—as they stood at the time of the contract, would be in the nature of *a fraud* upon the creditor. This consists with the definition by Mr. *Justice* Baldwin, in

McCracken v. *Hayward*, supra, [Bk. 11 Id. 399.]

The requirement of the community for untrammelled exchange of commodities, makes it necessary to relax the rule of delivery or deposit as in case of strict pledge, and it is accordingly modified, by leaving the assets with the obligor, with liberty to dispose of them for fair equivalent—the latter to stand under the same ligation.

But to the authorities upon this general subject of "impairing the obligations of contracts."

In case of mortgage, the right of the mortgagee as to the land and its rents can not be changed to his hurt.

Greenfield v. *Dorris*, 1 Sneed, 548.

Nor will time to redeem be extended, or a price

at a *minimum* sum be exacted to allow sale, in such case.

Bronson v. *Kinzie*, supra, [Bk. 11 Id. 143.]

It is so jealously guarded, that the time for enforcement of the obligation may not be extended.

Farnsworth v. *Vance*, 2 Cold. 108, 112.

Western Savings Fund Society v. *City of Philadelphia*, 72 Am. Dec. 734–5 [31 Pa. St. 175.]

The remedy at the time and place of the contract "are essential parts" of it, "and must be substantially preserved to the creditor."

Gunn v. *Barry*, 15 Wall, 610–24 [Bk. 21 Co-op. ed. 215.]

Rees v. *City of Watertown*, 19 Id. 107–25 [Bk. 22 Id. 76.]

"The withdrawal of property from the operation of the judgment * * * impairs the obligation of the contract."

Johnson v. *Fletcher*, 28 Am. Rep. 391 [54 Miss. 566.]

The fifth and sixth alleged errors, may be considered together, the only substantial difference of the constitutional clause to which the one relates from that referred to in the other is, the first clause, (in their order) as stated in my brief, is a *constitutional assurance* to all the people, that, exactions or privations shall not be made from them, except by "due process of law"; which, by necessary implication, forbids *every authority* from otherwise doing so; while the second clause forbids "any State," specially, to make exactions or inflict privations in any other way. The reason for this duplex form of the same inhibition, (inserted at different times, in the constitution) does not occur to me; unless it

may have been that, prior to the 14th amendment, in which the last clause occurs, some disposition in the State Courts, may have been manifested to restrict the clause, as expressed in the 5th amendment, to apply to only the national authority, and not to that of the States.

However this may be, the question, as presented in this case, falls with precision under the clause as expressed in the 14th amendment.

The provision is, as is well known, derived from *Magna Carta*, where the formula is—"by the law of the land;" and this phrase is used in the Constitutions of at least thirteen of the States,—Del., Ky., Maine, Md., Mass., Mo., New H., North C., Pa., Rhode I., South C., Tenn., and Tex.

Cooley's Const., Lim., note 1, (second note 1) to side p. 351.

It is universally conceded that, the formula used in the Constitution of the United States—"due process of law"—is the equivalent of that expressed—"law of the land," and of the same import.

Den. ex dem. *Murray* v. *Hoboken L. & I. Co.*, 18 How. 272–86 [Bk. 13 Co-op. ed. 374.]

Davidson v. *Board of Adm'rs of New Orleans*, 6 Otto. 97–108 [Bk. 24 Id. 618.]

Cooley's Const., Lim., side p. 353.

This opens the whole field of authorities as to both formulæ, and makes them applicable to the meaning expressed by that in the words—"due process of law"—in the Constitution of the United States.

Here, an *explication* rather than a definition is perhaps demanded, inasmuch as the latter refers to a word (as "obligation") while the former is appropriate to a *sentence*, or phrase.

It will be remarked as a fact, generally characteristic of the Constitution of the United States, that in the provisions to guard the rights of the

people, its framers selected words and phrases to express them, that are rather *inclusive* than *exclusive* in their significance and tendency; to cover the given extent in that case, of organic law in so limited space, this was necessary; but besides this consideration, one complimentary to their successors—the administrators of the new Government—seems to have animated those wise men in doing so; it was this, I conjecture, that—they hoped and *believed*, that in the succeeding years of the nation's life, the administration of its laws would never devolve on those inferior to themselves in patriotism, learning or sagacity, and who, therefore, might be safely trusted with the Constitution *as it is*, as a great *outline* chart, before them, discreetly to search out, find and lay down on its face, by wise exposition of it, the *details* of its application. Looking backward now, from this century-point, and viewing the result of this circumspection of the framers, the assurance is *full*, that we are without cause of regret on account of their trust in those to come after them. Far otherwise it might have been, if these founders had given to the American people a Constitution expressed in stiff, inelastic word; and rigid, restrictive phrase; the conscientious flexibility of equity, in contrast to the cast-iron rules of antient common law, may serve as an analogy, to indicate the hardship that probably would have resulted from use of unyielding terms and phrases in that instrument.

This Court has indicated to some extent, "what class of cases *do not* fall within" the constitutional provision under consideration, yet it has declined to declare any definite or precise rule, even of an outline character, or to indicate the essential elements or particular characteristics of an enactment that would *not* be "the law of the land"—or, to take a simile from punitive methods—it has not *badged the culprit with party-colored garb.*

Davidson v. *Board of Adm'rs of New Orleans*, supra, [Bk. 24 Co-op. ed. 618, 619–20.]

The definition (or explication) often quoted, given by Mr. *Webster*, in argument of the *Dartmouth College* cause, is terse and probably the most comprehensive that has been furnished by the bar; no higher, of such authority, could be found. It is in these words—"By the law of the land is most clearly intended the *general law;* a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. *The meaning is*, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the *general* rules which govern society."

Trustees of Dartmouth College v. *Woodward*, 4 Wheat. 581 [Bk. 4 Id. 645.]

It will be observed, that these requisites in Mr. *Webster's* definition are *composite* or *aggregative*, not *alternative—each of the four* is an *essential* of a "law of the land," in its principle, its administration and its execution, and he seems to have ranked them in importance according to the order of their enumeration.

Mr. *Justice* Johnson, in *Bank of Columbia* v. *Okely*, considering the clause as expressed by the words used in *Magna Carta*, gives this definition—"They were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the *established principles* of private rights and distributive justice."

4 Wheat. 244, [Bk. 4 Id. 561.]

Mr. *Freeman*, in note to *Bank of the State* v. *Cooper*, submits this—"The law of the land is a rule, alike *embracing* and *equally affecting all persons in general*, or all who exist or may come into the like state and circumstances."

24 Am. Dec. 544 [2 Yerger 599.]

And in a preceding clause of the note, (p. 539) he says—"The meaning [of the constitutional provision,] is, that every citizen shall hold his life, liberty, property, and immunities under the

protection of the *general rules* which govern society."

But, I submit, that such "like state and circumstances" as indicated in the next-last quotation above, must not be the result of *fortuity*, but such as follow from *economic*, *industrial* or *domestic* conditions, which a sound public policy recognizes, and accordingly favors those in such environment, but not from such conditions as are in their origin wholly *accidental*. With just as much propriety, according to both principle and precedent, might an act be passed exempting from liability for the husband's existing indebtedness, all the *black horses* that his wife brought him as dowry. I must be pardoned for repeating, that, I am not discussing an act that seeks to *take the title* to the property from the husband and confer it on his wife, but one that simply upon the ground that "it came by his wife," attempts to *exempt* property to which the husband himself had and *retains* absolute title.

The meaning of the phrase in the Constitution—"due process of law" and its equivalent—"law of the land," has perhaps been wisely left, for the present, to be determined according to the circumstances of each particular case, until from the various phases of question as presented in numerous cases involving it, by a process of judicial *evolution*, a satisfactory definition be derived; as is expressed by the apt language of Mr. *Justice* Miller, in *Davidson* v. *Board of Adm'rs of New Orleans*, as follows—"Apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."

6 Otto. 97–108 [Bk. 24 Co-op. ed. 619.]

An exemption law is, of course, always me-

liorative to the debtor, whether the case be of contract before or after its enactment. It at once occurs to mind, that such law must be equal, uniform—and impartial in its operation and effect—except in such instances as before referred to, where enlightened and humane public policy dictates that the arm of industry should not hang idle for want of *tools*, nor the helpless of the household go from hunger and want to indigence, by deprivation of necessaries.

A law that would be partial, either in its melioration to the debtor above other persons, or its privation of the creditor to an extent greater than others, would be as obnoxious as if both these results followed it, as in most instances they must.

Cooley on Taxation, 153.

Vanzant v. *Waddel*, 2 Yer. 260.

Wally v. *Kennedy*, Id. 555–6.

Bank of the State v. *Cooper*, supra, p. 524 [2 Yer. 607–8.]

State ex rel. *Tieman* v. *City of Indianapolis*, 35 Am. Rep. 226 [69 Ind. 375.]

It is furthermore, obvious that such a law should declare a *measure*—more or less definite—as a linrit to the exemption. It would seem also, as before urged, that such a law, in any discrimination it makes, of those in the community in general, that it specially favors, must rest this discrimination on reason that grows out of the industrial or the domestic order, and not rest it on the mere *accident* of fortune.

Does the word property, as used in the Constitution, include the contract right of a creditor?

Without looking to the technical sense; the context and connection in which it is used in the Constitution, must indicate when construed according to *common intent*, that such a right is so

included. The clause embraces, life—liberty—property—the great trine of individual right—this too, where it occurs in both amendments; thus evincing that the whole scope of that individual right was meant to be covered by the guarantee. But when considered technically—which would be the correct rule by which to construe it—its import is ascertained by demonstration, the right in such case being a chose in action, it falls under the denomination of property—incorporeal property.

11 *Bouvier's Law Dictionary*, title "property," 7–8.

Id. " "Things," 7.

1 Id. " "Chose."

Williams on Personal Property, 5, 7.

Cooley's Const., Lim., side p. p. 361, 362, 391, 392.

Would the act deprive the creditor of his property? If the last above conclusion be correct, then the answer to this question is inevitable, that it does so deprive; this without argument.

Next the question is presented—is the act of 1879, the "law of the land"? taking this qualitative to have the same sense as "due process of law."

A legislative enactment may as widely differ from the law of the land, as the most erroneous or wicked abuse of discretion by the Court, or as the grossest oppressiveness or favoritism by the executive. It is happily not a maxim of law in this country that—the Legislature can do no wrong. The forcible language of Justice *Bronson* of New York, completely expresses what a contrary view would imply—I quote—"The words 'by the law of the land,' as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and

turn this part of the constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with' 'the legislative power of the State;' but no one 'shall be disfranchised, or deprived of any of the rights or privileges' of a citizen, unless you pass a statute for that purpose;' in other words, 'you shall not do the wrong, unless you chose to do it.'"

Taylor v. *Porter*, 40 Am. Dec. 278, [4 Hill, 140.]

That this constitutional provision is as applicable against legislation as against the administrative and executive departments, see

Trustees of Dartmouth College v. *Woodward*, supra, p. 581 [Bk. 4 Co-op. ed. 645.]

Den. ex dem. *Murray* v. *Hoboken L. & I. Co.*, supra, [Bk. 15 Id. 374.]

Mr. Webster's argument, in *Dart. Col. case*, supra, p. 581 [Bk 4 Id. 645.]

Hoke v. *Henderson*, 25 Am. Dec. 688 [4 Devereux's Law 1.]

Regents of University of Maryland v. *Williams*, supra, p. 99.

"There is a fundamental principle of right and justice inherent in the nature and spirit of the social compact which restrains and sets bounds to legislative power," as is well said by Mr. *Freeman* in note to *Regents of University of Maryland* v. *Williams*, supra, (p. 112), and see

Cooley's Const., Lim., side p. 356.

General exemption laws can not be varied for particular cases.

Bull v. *Conroe*, 13 Wis., 233–244.

Without any past declaration of this Court upon the precise question now presented, so far as I have found, I submit that—under the reserve that *is express* in the language above quoted of Mr. *Justice Miller*—the instance now pre-

sented is one to which the constitutional provision under consideration, most fitly and necessarily applies; I urge this all the more cautiously because of the rebuke contained in the next preceding paragraph to that before quoted as the language of Mr. *Justice* Miller, in the opinion in *Davidson* v. *Board of Adm'rs of New Orleans*, which rebuke is that it would seem in "many * * cases * * * the clause under consideration is looked upon as a means of bringing to the test of the decision of this Court the abstract opinions of every unsuccessful ligitant in the State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

As before remarked, (and noticed in my brief also,) the act of 1879 is an exemption act—pure and simple—in favor of the husband. The issues of the land during coverture, were included under his right, when the act passed, and it did not assume to deprive him of this right by conferring it on the wife; then the property is exempted as that of the *husband*—his as complete as it ever was, or can be—not that of the wife. The act of 1849–50, as to the land itself, is in the same category; under that act, the husband's estate for life *jure mariti*, is not touched, except as the *profits* of it are by that of 1879—that is by exempting it from liability for his indebtedness, save that he is also restrained from aliening it during the life of the wife without her concurrence. Hence the act of 1879 can not be predicated upon that of 1849–50, as the State Court sought to do in *Taylor* v. *Taylor*, (12 Lea, 490,) the authority of which was relied on in behalf of Mrs. Scruggs in the State Supreme Court. The same Court has held that since the act of 1849–50, and before that of 1879, the profits belonged to the husband.

Lucas v. *Richerick*, 1 Lea 728.

It also held that the act of 1849–50 did not create a "separate estate" in the wife, and is only in *restraint* of the husband.

Johnson v. *Sharp*, 4 Cold. 50.

Lucas v. *Richerick*, supra, p. 726.

If either act be intended to take from the husband that which was his, and give it to the wife, it would be at variance with "the law of the land," because such divestiture could only be effected "by sentence," and not the legislative department of government.

Hoke v. *Henderson*, supra, p. 686.

Regents of University of Maryland v. *Williams*, supra, p. p. 97, 99.

Then it must be clear, that the act of 1879 (and for that matter that of 1849–50,) attempts to give to the husband in such case, property of an indefinite amount, for his own enjoyment and with unrestrained power of disposal—unless it be to surrender it to satisfy his indebtedness. Upon this ground, I submit, the authorities abundantly forbid this to be done or allowed, for the reason that a debtor can not hold and enjoy property, and yet it be shielded from the demands of his creditors.

Hallett v. *Thompson*, 5 Paige Chancery, 587.

Heath v. *Bishop*, 55 Am. Dec. 655, 658, 661 [4 Rich. Equity, 66.]

Penrose v. *Erie Canal Co.*, 93 Am. Dec. 780, [56 Pa. St. 46.]

McIlvaine v. *Smith*, 97 Am. Dec. 302, [42 Mo. 45.]

Graves v. *Dolphin*, 1 Simons, 66.

2 Story's Eq. Jurisprudence, sec. 974 *a*.

To return to consideration of "the law of the land" as one of general application.

It "embraces all persons" in "like situation and circumstances."

Mayor of Alexandria v. *Dearmon*, 2 Sneed, 122.

Discrimination in taxation is not permitted.

Mayor, etc., *of Nashville* v. *Althrop*, 5 Cold. 560.

Must "be a general law."

Pope v. *Phifer*, 3 Heisk, 703.

A limitation of its objects is fatal to it.

Bronson v. *Kinzie*, supra, p. 320. [Bk. 11 Co-op. ed. 146–7.]

It must operate equally on every member of the community, and must not be "a partial law, by which the right of any individual shall be abridged or taken away."

Jones v. *Perry*, 30 Am. Dec. 433–4, 440, [10 Yer. 59.]

Regents University of Maryland v. *Williams*, supra, p. 99.

Westervelt v. *Gregg*, 62 Am. Dec. 166–7, [12 N. Y. (2 Kernan) 202.]

All the members of the community "by the law * * * must be treated alike."

Holden v. *James*, 6 Am. Dec. 174 [11 Mass. 396.]

City of Shreveport v. *Levy*, 21 Am. Rep. 553 [26 La. Ann. 671.]

Pearson v. *City of Portland*, 31 Id. 277 [69 Maine, 278.]

"It is not the partial nature of the rule, so much as its *arbitrary* and unusual character, that condemns it as unknown to the law of the land," says Mr. *Cooly*.

Const., Lim., side p. 355.

If it be urged, in opposition to the view presented as to the grounds upon which exemption

laws must rest, that *all men*, who marry women that are land owners during coverture, are *alike* favored by the law, and that hence it is *general;* I rejoin, that while it may be general in some such sense, as favoring a designated *part of the community*, it is not so in its *legal* sense, when the word "general" is used to describe a law; because such *lucky husbands* do not constitute a "*class*" according to any *industrial* or *domestic* distinction. The institutions of industry and the household, in every civilized and enlightened community, are recognized by its organic and other laws; and, as before urged, it is the part of *sound policy* in such government, to indulge the interests that affect these institutions; but there is no reason dictated by such policy to favor a husband, whom fortune has already favored with a land-owning wife, by exempting his income, yielded by her lands, from liability to the claims of his creditors. The Legislature might just as well enact that all lands of the debtor, with the proceeds of such lands, which he had acquired by inheritance from the *maternal* side, should be so exempt. Or, indeed that the income to the debtor from *all* lands in which he had but a *life estate*—not limiting to only those acquired *jure mariti*—should be so exempt.

Referring again to the question of liability of issues in expectancy of land owned by the wife when the act was passed—the marriage then subsisting.

The right of the husband to these issues had vested and could not be divested, as has before been urged, and authorities in similar cases in New York and Pennsylvania in support of this are here cited.

Berley v. *Rampacher*, 5 Duer. 183.

Benedict v. *Seymour*, 11 Howards Practice, 176.

Blood v. *Humphrey*, 17 Barb. 660.

Stehman v. *Huber*, 21 Pa. St. 260.

And see opinions in cases before cited (p. 7 this argument.)

White v. *White.*

Snyder v. *Snyder.*

Holmes v. *Holmes.*

Watson v. *Bonney.*

II *Kent's Com.* 130.

Pritchard v. *Citizens' Bank.*

Van Duzer v. *Van Duzer.*

If the wife has a right contingently to personal property, her husband's contingent interest in it can not be taken away by subsequent legislation.

Dunn v. *Sargeant*, 101 Mass. 336.

The husband's vested right is good against even the wife's equity.

II *Kent's Com.* 141.

Where the party "has a potential interest in the thing sold," he may make valid transfer of it, and the right to the future accruals is a vested one also.

Low v. *Pew*, 11 Am. Rep. 359 [108 Mass. 347.]

"Crops * * * depending on present existing property or interest [are] the subject of sale or assignment."

Evermann v. *Robb*, 24 Id. 686–7 [52 Miss. 653.]

It is not alone the property, in any case, held by the debtor at the time of the contract, that is lsoked to by the creditor, but the probable or possible acquisitions of the debtor as well, and these "when acquired, will, under existing laws, be liable to the debt."

Johnson v. *Fletcher*, 28 Am. Rep. 391 [54 Miss. 628.]

Sturges v. *Crowninshield*, 4 Wheat. 198, [Bk. 4 Co-op. ed. 549.]

Sheppard's Touchstone, 242.

Of the opinion in *Taylor* v. *Taylor*, (12 Lea 490,) relied on in behalf of Mrs. Scruggs, I offer this criticism—It was concurred in by but three of a court constituted of five Justices—it had been considered by referees (as then provided in Tennessee), and upon their Report it was heard by the Court proper—that Report (unanimously, so far as shown—there being three Referees,) declared the act of 1879 unconstitutional. The opinion was pronounced in 1883. It would hardly be regarded as settled authority for any purpose.

Finlay v. *King's Lessee*, 3 Pet. 341 [Bk. 7 Co-op. ed. 700.]

Lessee of Gantly v. *Ewing*, 3 How. 716 [Bk. 11 Id. 798.]

The fallacy of its reasoning—that because the issues of the land were not *in esse* at the time the Act was passed, therefore the Act is not repugnant to the Constitution as to the *future accruals* from the land—this fallacy is apparent, I submit, on a moment's reflection—the ordinary measure of valuation of *any* property is its *beneficial use*, which is the same thing as its capacity to *produce* that which is *desirable*—hence this capacity to produce is the chief element of *present value* in *all* property—the issues of the land are but the *yield*, of that which *is* in *esse*, and just as much so in case of the husband's right *jure mariti* to the wife's land as in any other.

It may indeed be matter of doubt how far this Court will accept the construction by the State Court of the act as to its retrospective meaning and operation.

Gunn v. *Barry*, supra, [Bk. 21 Id. 214.]

Bruce v. *Schuyler*, 46 Am. Dec. 460, [1 Gilman 221.]

The act is not in *terms* retrospective as to antecedent contracts of the husband; and unless an act be *express*, it will not by construction merely, be given an application that would render its effect unconstitutional.

Lane v. *Dorman*, 36 Am. Dec. 545 [3 Scammon 238.]

Bruce v. *Schuyler*, supra, p. 454.

Dash v. *Van Kleeck*, 7 Johns, 499.

This doctrine would probably be stronger in Tennessee, because of the provision in the Constitution of that State which declares—"That no retrospective law * * * shall be made."

Article 1, section 20.

This language is too unambiguous to admit of controversy, and the doctrine of *Taylor* v. *Taylor* is palpable *disregard*, rather than an interpretation of the State Constitution.

There are instances where this Court has declined to accept the constructions given by State Courts of the laws and Constitutions of their respective States, but has construed them for itself; and this, not only in cases where the State Court had not yet announced its construction where the Federal jurisdiction attached in the case that came to this Court, but also in cases where such construction had been so announced. It is only where these decisions of the State Courts "have become rules of property," that this Court in general accepts them.

Carroll County v. *Smith*, 111 U. S. 556–65 [Bk. 28 Co-op. ed. 519–20.

United States v. *City of Muscatine*, 8 Wall, 575–87 [Bk. 19 Id. 493–4.]

Louisville, etc., *Railroad Co.*, v. *Palmes*, 109 U. S. 244–58, [Bk. 27 Id. 926.]

The only intent of submitting to this Court an argument designed to show the inconclusive-

ness of the decision of the State Court in *Taylor* v. *Taylor*, supra, is with regard to the effect of that decision to secure rights that may have *accrued after it was promulgated*. In such case this Court has refused to sustain a claim of right that had accrued under very nearly, if not exactly, the conditions above indicated.

Louisville, etc., *Railroad Co.*, v. *Palmes*, supra.

But it is not shown to any reasonable certainty, that the cattle levied on in this case, were of the issues of *any* of Mrs. Scruggs's lands after 1883, when the opinion in *Taylor* v. *Taylor* was announced. Even if this were shown, it could hardly be held that her *right* to them accrued after that decision, but that the property only *came into being*, and was claimed by her under a right *asserted before*. Mrs. Scruggs's *status*, in relation to the property, was not in any way changed after 1883, from what it was towards the issues of the lands before.

It is not shown by the opinion in *Taylor* v. *Taylor*, that the fact existed in that case, that, *at the time* the act of 1879 was passed, the wife *had acquired* the land—the only reference to the time of such acquisition is in these words—"by inheritance from her father lately deceased." To give the opinion the form and weight of authority, in the case at bar, the fact of such antecedent acquisition must have existed in that case, as is well settled, and needs no citations.

A few words more as to the liability of the issues of the land after the act of 1879. In *Taylor* v. *Taylor*, the Court seeks to find ground on which to rest the decision in its favor *to the wife*, on the fact that, the issues not *in esse* at the time of the act, would stand divested thereby of any right of the husband; but the same Court had theretofore declared that the issues accruing *in futuro* as well as present must follow the vested title of the husband, and all alike be liable to satisfy his creditor.

Lucas v. *Rickerick*, supra, p. 728, and see *Planters' Bank* v. *Sharp*, supra, p. 328, [Bk. 12 Co-op. ed. 459.]

Take the act as it appears—whether the exemption be constitutional or not—and yet it seems at least, that the wife, under the act can have *no title* to the property sued for, and therefore the action can not be maintained in her behalf—The act leaves the property, that of the *husband*, and therefore he should sue. If the wife had no *right* to the property, then there was nothing in the case from its beginning, that had *vitality* to support an *amendment* as to parties, and introducing her husband as a party plaintiff by amendment was "engrafting on a lifeless stock," and therefore nugatory.

Referring again to "the law of the land,"—It is a little remarkable that the Constitution of the State from which this cause comes, contains a provision *unusually expressive*, in its terms, as follows—"The Legislature shall have no power * * * to pass any law for the benefit of individuals, inconsistent with the general laws of the land."

Const. of Tennessee, Article XI, sec. 8.

A word of comment on the opinion in *Rugh* v. *Ottenheimer*,

25 American Reports, 513 [6 Oregon, 231.] which at first may seem to hold to the contrary of the foregoing views. A clause of the Constitution of Oregon declares—"The property and pecuniary rights of every married woman at the time of marriage or afterward, acquired by gift, devise or inheritance, shall not be subject to the debts or contracts of the husband," (p. 513). Here, it is true, the estate by curtesy and that by the marital right are not denied to the husband. That action is described as a "suit in the nature of a cross-bill to an action of ejectment." It was by the wife, against a claimant under Sheriff's deed based on judgment and execution against the husband (p. 514). The marriage oc-

curred in 1857. In 1856, the wife acquired land. In 1869, she exchanged this land for that in controversy, but received no deed. The latter was afterwards executed to her husband, who promised to convey to the wife, but afterwards refused to do so. (It appears that by the agreement to exchange, the deed was to be made to the wife,) (p. p. 513, 514). The Constitution of Oregon went into effect on the admission of the State—1859. It is thus seen, that the tract of land in controversy was acquired (though in the name of the husband) some ten years *after* the Constitution went into effect, so that the case for the Sheriff's vendee, rested alone upon the fact of *antecedent marriage*. Besides it is probable that, under the facts of that case, a resulting trust in favor of the wife attached to the title in the husband's hands. The facts of the case do not present one of "lands owned in their own right by married women at the time of marriage." The subsequently acquired land would perhaps only be subject to such right of the husband as the law at the time of the subsequent acquisition declared. The clause near the end of the opinion as to this would be but *dicta*, (p. 518.)

F. A. Reeve,

Counsel for plt. in error.

SUPPLEMENT.

The following authorities are cited, by way of supplement, to support the views respectively that are urged in the foregoing argument.

In such cases exemption laws are not applicable against antecedent debts.

Hockady v. *Sallee*, 26 Mo. 219.

Harvey v. *Wickham*, 23 Id. 112.

Such an act, as to the property held at the time of its passage, does not operate to give the wife a separate estate.

Rose v. *Sandersou*, 38 Ill. 247.

The husband's vested rights in such case are beyond legislative interference.

Rose v. *Sanderson*, supra.

Courts will do no violence to the *language* of the law, in such case, as against rights of creditors.

Rose v. *Sanderson*, supra.

For an interesting opinion as to both constitutional questions—See

Palairet's Appeal, 5 Am. Rep. 450 [67 Pa. St. 479.]

It is remarkable that in the State of Tennessee an act such as that of its General Assembly which is under consideration, should have passed the judicial test of its own court, as both in its quality of *partial legislation*, and that of *impairing vested rtghts*, such an act is more pointedly forbidden by the Constitution of that State than even in the Constitution of the United States.

Const. of Tenn., *Art. XI*, *sec.* 8.

H. A. Reese,
Counsel for plt. in error

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 322.

ALLEN BAKER, Plaintiff in Error,

vs.

THOMAS KILGORE, next friend of Eliza J. Scruggs, and her husband, Fred Scruggs.

ERROR TO SUPREME COURT OF TENNESSEE.

BRIEF FOR DEFENDANTS.

THE CASE IS IN A NUT-SHELL.

Judgment was recovered against the husband in 1876. At that time the wife owned no realty. In 1877 she acquired a tract of 274 acres. But this was not subject to said judgment, because, by the Code of Tennessee, Section 2481, "the interest of a husband in the real estate "of his wife, acquired by her either before or after "marriage, by gift, devise, descent or any other mode, "shall not be sold or disposed of by virtue of any judg- "ment, decree or execution against him." This has been the law of Tennessee since 1849.

In 1879 was enacted a statute protecting the rents and profits of the wife's land likewise from the husband's creditors; and thereafter, in 1881 and 1886, the wife acquired two other tracts of land amounting to 240 acres.

She owned four (4) head of cattle—proceeds of the rents and profits of said land accruing after the year 1879. In 1886, the husband's creditors seized them to satisfy his said judgment.

By the law of Tennessee the right of the husband to the future rents and profits of the wife's land, before the

Act of 1879, was, at most, a mere inchoate right, subject to be abridged or modified at the pleasure of the Legislature. He had no vested right in the future products of his wife's land. The effect of the Act of 1879 was not to exempt the property of the husband, but to protect the property of the wife.

Taylor vs. Taylor, 12 Lea, 497-8.

It is plain, therefore, that the statute of 1879 complained of did not impair the obligations of the husband's contract, nor deprive him of any vested right in his wife's property; and that the decision of the Supreme Court of Tennessee in this case was not against any right held by plaintiff in error under the Constitution of the United States.

HENRY H. INGERSOLL,

Counsel for Defendants.